No. 02-964 Status: GRANTED
Title: George H. Baldwin, Petitioner
v.
Michael Reese
Docketed: December 24, 2002
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-35153)
Decision Date: March 12, 2002
Rehearing Denied: September 3, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 2 2002	Petition for writ of certiorari filed. (Response due January 23, 2003)
Dec 2 2002	Supplemental Appendix of petitioner filed.
Jan 23 2003	Brief amicus curiae of Indiana, et al. filed.
Feb 19 2003	Response Requested . (Due March 21, 2003)
Mar 13 2003	Order extending time to file response to petition to and including April 21, 2003.
Apr 12 2003	Response to petition from respondent Michael Reese filed.
Apr 21 2003	Motion for leave to proceed in forma pauperis filed by respondent Michael Reese.
May 2 2003	Reply of petitioner George H. Baldwin filed.
May 27 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 27 2003	Petition GRANTED.
Jul 9 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 24, 2003.
Jul 24 2003	Brief amicus curiae of Indiana, et al. filed.
Jul 24 2003	Brief of petitioner George H. Baldwin filed.
Jul 24 2003	Joint appendix filed.
Jul 24 2003	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Aug 7 2003	Motion of respondent for appointment of counsel.
Aug 14 2003	Brief of respondent Michael Reese in opposition filed.
Aug 27 2003	Motion DISTRIBUTED for Conference of September 29, 2003.
Sep 18 2003	Reply of petitioner George H. Baldwin filed. (Distributed)
Sep 24 2003	SET FOR ARGUMENT Monday, December 8, 2003
Oct 6 2003	Motion to appoint counsel filed by respondent GRANTED. Dennis N. Balske, Esquire, of Portland, Oregon is appointed to serve as counsel for the respondent in this case.
Oct 9 2003	CIRCULATED.
Oct 23 2003	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Oct 23 2003	Record received from the U.S.D.C. for Oregon. (1 box)

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No. 02-

In the Supreme Court of the United States

OCTOBER TERM, 2002

DEC 27 2002

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
MICHAEL D. REYNOLDS
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***Counsel of Record**

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QUESTION PRESENTED

By statute and this Court's caselaw, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. This Court has held that exhaustion requires a state prisoner to fairly present his claim to the state's highest court and that fair presentment requires the prisoner to have alerted the state court that the claim is a federal one.

Does a state prisoner "alert" the State's highest court that he is raising a federal claim when — in that court — he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis?

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PETITION FOR WRIT OF CERTIORARI

Petitioner George H. Baldwin ("the State")[1] respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Reese v. Baldwin*, No. 01-35153 (March 12, 2002), *reh. den.* (September 3, 2002).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 282 F.3d 1184 (2002), and is attached to this petition as Appendix A. The district court's opinion is not reported and is attached to this petition as Appendix B.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' opinion was dated and filed March 12, 2002. The State timely filed a petition for rehearing and suggestion for rehearing en banc. By order filed September 3, 2002, the court denied that petition. A copy of that order is attached as Appendix C. This petition is filed within the 90-day period following the denial of rehearing as prescribed by 28 U.S.C. § 2101(c) and Rule 13(3) of the Rules of the Supreme Court of the United States.

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[1] This case involves numerous proceedings below and the labels attached to the parties changed accordingly. In order to avoid confusion, petitioner Baldwin refers to the parties as "Reese" and "the State" rather than by their roles in the various proceedings.

STATUTE INVOLVED

28 U.S.C. § 2254 provides, in part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

> (A) the applicant has exhausted the remedies available in the courts of the State; * * *

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

Reese was convicted in state court of kidnapping (two counts) and attempted sodomy. The trial court gave Reese a determinate sentence of 30 years on the kidnapping convictions. On appeal, the Oregon Court of Appeals affirmed the convictions but remanded for resentencing because the trial court had left out a step in the sentencing process. The trial court resentenced Reese, Reese again appealed, and again the court of appeals remanded for resentencing because the trial court had not properly complied with the additional step that it had omitted from the first sentencing. Following the second resentencing, Reese again appealed. His appointed appellate counsel could find no non-frivolous issues in the appeal, so he filed a "*Balfour*" brief, which is Oregon's analogue to an *Anders* brief. *See State v. Balfour*, 311 Or.

434, 814 P.2d 1069 (1991). As required in a *Balfour* brief, counsel assisted Reese in presenting the issues he wished to raise on appeal; Reese raised five assignments of error. The court of appeals affirmed. Reese did not file a petition for review in the Oregon Supreme Court.

Reese then filed a *pro se* petition for post-conviction relief (PCR) in the state trial court. The court appointed counsel, who filed an amended PCR petition asserting, among other claims, ineffective assistance of both trial and appellate counsel. The amended petition, unlike the original *pro se* petition, specifically cited provisions of the federal and state constitutions in support of Reese's claims.[2] The trial court, in a written opinion, denied

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[2] The amended petition stated, in part:

> Petitioner was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that counscl on appeal failed to:
>
> a. Withdraw as attorney for Petitioner due to conflict of interest in that her husband * * * had been the attorney for prosecution three times on Petitioner's cases;
>
> b. Notify Petitioner in advance when she removed Petitioner's attorney * * * from Petitioner's case and became the attorney of record for Petitioner without Petitioner's consent;
>
> c. Raise issues that had been preserved for appeal;
>
> d. File a timely Notice of Appeal;

Reese's PCR petition. In denying Reese's ineffective assistance of appellate counsel claim, the trial court cited a federal case, *Jones v. Barnes*, 463 U.S. 745 (1983). The PCR trial court also denied his ineffective assistance of trial counsel claim, citing both federal and state cases.

On appeal, Reese's newly-appointed counsel, unable to identify any non-frivolous issues, prepared a *Balfour* brief that set forth the statement of the case and then, at Reese's request, incorporated into the brief claims of error that Reese had set out in his *pro se* PCR petition.[3] As a result, Reese asserted a claim for "ineffective assistance of appellate counsel," but without any reference to federal law, federal constitutional provisions, or authorities construing federal provisions on which he might be relying.[4] The court of appeals summarily affirmed the PCR trial court's judgment in an unpublished order.

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e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

[3] The Ninth Circuit mistakenly suggested that the responsibility for deciding to incorporate Reese's original PCR petition, rather than the amended petition, into Reese's Court of Appeals brief was that of Reese's appointed appellate counsel. App-6. As the State pointed out in its petition for rehearing, under Oregon's *Balfour* procedure, it is the appellant who chooses which claims to present in the *pro se* portion of the brief, not counsel. *See Balfour*, 311 Or. at 452, 814 P.2d at 1080 ("Counsel * * * shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it.").

[4] Reese's brief set forth his claim as follows:

Second Claim for Relief: Ineffective Assistance of Appellate Counsel.

Reese's counsel then filed a petition for discretionary review in the Oregon Supreme Court.[5] The petition included a cursory statement that one of the issues presented was the adequacy of appellate counsel. The petition contained no citation to any constitutional provision or authority of any kind; nor did it contain any argument in support of the claim.[6] The supreme court denied the petition in an unpublished order.

Facts: Mr. Jesse Wm Barton [(Reese's second appellate counsel)] did knowingly and willfully fail to file in a timely matter [*sic*] a notice of my intention to appeal in the Oregon ruling [*sic*] to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this is per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's [*sic*] did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

[5] Unlike the Court of Appeals brief, the petition in the Supreme Court was not submitted in accordance with the *Balfour* procedure; it was fully prepared by Reese's counsel and did not include a *pro se* portion.

[6] In the "Statement of legal questions presented on review," "Statement of reasons for reversal of Court of Appeals and "Statement of Facts," Reese stated, *inter alia*, that he was setting forth "errors with respect to * * * ineffective assistance of both trial court and appellate court counsel." In the "Argument" section of the petition, Reese restated, without argument, that he was asserting "in-

Reese next filed a *pro se* federal habeas corpus petition; the district court appointed counsel and counsel filed an amended petition that included a claim that Reese had received ineffective assistance of counsel on direct appeal from his criminal conviction. The district court concluded that Reese had not properly exhausted in state court his federal claim of ineffective assistance of appellate counsel and that the claim was procedurally defaulted. The district court denied Reese's other claims and entered judgment dismissing his petition. App-38.

Reese appealed to the United States Court of Appeals for the Ninth Circuit. The court noted that the only issue before it was the district court's determination that Reese had procedurally defaulted his claim of ineffective assistance of appellate counsel. App-9. In a footnote, the court observed that there was no serious contention that, if there were procedural default, Reese could satisfy the "cause and prejudice" requirement or demonstrate that the court's refusal to hear the claim would result in a "fundamental miscarriage of justice," excusing the procedural default. App-9.

In its opinion, the Ninth Circuit devoted several pages to explaining the proper analysis that it believed should be applied in determining the exhaustion/procedural default question. App-10 to App-14. Citing to *Lyons v.*

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effective assistance of counsel." He did, however, conclude the argument section of the petition with the following statement concerning his *trial* counsel: "Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated."

Crawford, 232 F.3d 666 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001), the court correctly stated that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it. Accordingly, presenting a federal claim explicitly at the PCR court in itself is not sufficient for exhaustion." App-13. The court then concluded that this "indication" requirement was satisfied as to the State's intermediate appellate court because "[e]ven though Reese's brief to the Oregon Court of Appeals did not cite federal authority, * * * the PCR court's citations to *Strickland* [*v. Washington*, 466 U.S. 668 (1984),] and *Jones v. Barnes* placed the Oregon Court of Appeals on notice that it was reviewing a federal question that the PCR court decided on explicit federal grounds." App-15.

Employing essentially the same analysis, the Ninth Circuit also concluded that Reese properly had presented his federal claim to the Oregon Supreme Court. The court assumed that, "simply by reading the PCR court decision," which was not attached or referred to in the petition for review, "the Oregon Supreme Court would have been alerted that the claim for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law." App-17. Moreover, the court deemed it irrelevant whether the state supreme court had actually read the trial court's opinion; what was important was that it "had the opportunity" to read it. App-18. And because the supreme court had the opportunity to read the trial court's opinion, the Ninth Circuit concluded that Reese had "fairly presented" his federal claim of ineffective assistance of appellate counsel to the Oregon Supreme Court. App-19.

REASONS FOR GRANTING THE WRIT

Since 1886, this Court has required state prisoners to exhaust their federal claims in state court before those claims can be considered in a federal habeas corpus proceeding. Yet few procedural issues plague federal courts more consistently than the question whether state prisoners have exhausted and, thus avoided procedurally defaulting, their federal claims in state court. *See Castille v. Peoples*, 489 U.S. 346, 349–350 (1989) ("Today we address again what has become a familiar inquiry: '*To what extent* must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?'") (emphasis in original, citation omitted). Lower federal courts have grappled, often laboriously, with the question of whether state prisoners have "fairly presented" their claims.

Although this Court has imposed an explicit requirement that state prisoners "fairly present" their federal claims first in state courts before they can be raised in federal habeas corpus, the federal courts have treated that requirement in very different ways. The approaches followed by the majority of circuits have not been faithful to this Court's recent pronouncements. It has been over seven years since this Court's decision in *Duncan v. Henry*, 513 U.S. 364 (1995), where the Court made clear that, to satisfy exhaustion/procedural default requirements in federal habeas litigation, state prisoners must "alert" state courts that they are bringing federal claims in state court—that if they wish to raise a federal claim in state court they must "say so" just as they must in federal court. Yet, with a few exceptions, the federal circuit

courts seemingly have not paid attention to or have not grasped the significance of *Duncan*'s lessons. They do not insist that state prisoners, in their state appellate filings, "say so" when they wish to raise a federal claim in state court. Instead, a majority of the federal courts continue to strive to discern for themselves the true substance of the claims prisoners raised in state courts, rather than requiring state prisoners to have stated, expressly, in the State's highest appellate court that they are raising federal claims.

Notwithstanding efforts by this Court to shed some light on the meaning of "fair presentment," lower courts employ at least three separate tests in resolving "fair presentment" issues. The tests used by a majority of the circuits do not require the state prisoner to articulate clearly his federal claim in the state courts. Instead, a federal courts attempt to discern the true nature of a state prisoner's underlying claim—in effect, whether the "substance" of the claim presented in state court was federal in nature. That quest has proved elusive at best; it has swallowed precious time and resources of the courts and the parties; and it has produced uncertainty and inconsistency in results.

Moreover, the test used by a majority of the courts fails to recognize the principles of state-federal comity that this Court clearly has stated underlie the exhaustion requirement. In *Picard v. Connor*, 404 U.S. 270, 275 (1971), this Court explained that underlying principle as follows:

> It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must nor-

mally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. § 2254(b) and (c), reflects a policy of federal-state comity, "an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.

(footnote and citations omitted).

The confusion among the circuits suggests that this Court needs to clarify the meaning of "fair presentation" and provide a bright-line test that requires state prisoners unambiguously to identify in the state courts the federal nature of any claim. A requirement that a prisoner clearly state his federal claim in state court imposes little burden on the petitioner, while providing enormous benefits in the efficient processing of the federal courts' habeas litigation. Such a requirement also is faithful to the comity concerns underlying the exhaustion principle. The Ninth Circuit did not employ that approach below and, as a result, it erroneously concluded that Reese had exhausted his federal claim in state court. This case presents the

Court with the opportunity to provide circuit courts with badly needed clarification of the meaning of "fairly presented" in federal habeas litigation and, in doing so, to bring consistency to federal circuits' efforts to resolve exhaustion/procedural default questions. This Court should seize that opportunity, grant the petition for writ of certiorari, and reverse the decision of the Ninth Circuit.

This petition first will briefly discuss this court's two most recent cases in the area—*Duncan v. Henry* and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). The petition then will canvass the circuits and identify the different tests currently used to resolve exhaustion/procedural default questions, tests that are inconsistent and that, at least for the majority of circuits, ignore this Court's recent admonitions. Next, the petition will address how the tests used by the majority of the circuits fail to give proper respect to the federal-state comity concerns that underlie the exhaustion requirement. Finally, the petition will explain why the Ninth Circuit decision below affords the Court the opportunity to address and resolve a problem that appears to have perplexed many federal courts.

I. Most circuits—including the Ninth Circuit—have ignored this Court's admonitions regarding the necessity of a habeas petitioner explicitly presenting a federal issue to a State's highest court.

In two recent cases, this Court has clarified the exhaustion requirements for federal habeas purposes. In both cases, a comparison of the majority and dissenting opinions demonstrates that the Court endeavored to

adopt clear, workable rules to guide courts in the exhaustion/procedural default arena. And those rules should have been easy to apply. Nonetheless, as will be shown in the next section, the lower courts have failed to heed this Court's efforts.

In *Duncan v. Henry*, this Court concluded that Henry, a federal habeas petitioner, had not raised a federal due process claim in state court and thus, had procedurally defaulted that claim for federal habeas purposes. The Ninth Circuit, employing what to then had been fairly standard exhaustion/procedural default principles, had concluded that Henry had "fairly presented the substance of his federal claim to the state courts," thereby satisfying the exhaustion/procedural default requirements of § 2254. *Henry v. Estelle*, 33 F.3d 1037, 1040–41 (9th Cir. 1993) (relying on *Picard v. Connor* and *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (stating that the purpose of the "fair presentation" requirement is to provide the state courts with a "fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.")). The Ninth Circuit reached this conclusion because, although not labeling his state court claims in federal terms, Henry had made essentially the same arguments before the state court as he made in the federal court in support of his federal claims. *Ibid.*

In rejecting the Ninth Circuit's approach, this Court did not characterize the question as whether Henry had fairly presented the *substance* of his federal claim to state court; rather, it cited *Picard* as requiring that *the federal claim* itself be fairly presented. The Court then stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

513 U.S. at 365. The Court concluded that Henry had not satisfied this requirement because he "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Ibid.*

Three justices concurred in *Duncan* and one justice dissented. The concurring justices agreed that Henry had procedurally defaulted his federal claim because his claim in state court that there had been a "miscarriage of justice * * * was reasonably understood to raise a state-law issue of prejudice, not a federal issue of due process." *Id.* at 366–367 (Souter, J., concurring). The dissenting justice, however, was highly critical of the majority for "tightening the screws" on federal habeas exhaustion requirements and for adopting a "talismanic language" approach to resolving exhaustion/procedural default questions. *Id.* at 367–68. (Stevens, J., dissenting). The dissent argued that all *Picard* had required was that the "substance" of the federal claim be presented, that the Court had not before insisted that the prisoner "place the correct label on his claim, or even cite the Federal Con-

stitution." *Id.* at 367. The majority's departure from these precedents, in the dissent's view, was both "hypertechnical and unwise." *Id.* at 369.

Four years after *Duncan*, this Court extended the "fair presentment of federal claims" requirement to include review by the State's highest appellate court, even where that review is discretionary. In *O'Sullivan v. Boerckel*, 526 U.S. 838, 848–49 (1999), this Court held that "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

In his dissent in *O'Sullivan*, Justice Breyer recognized that a consequence of this requirement was that it would likely overburden state supreme courts with the filing of petitions seeking review of non-review-worthy cases. 526 U.S. at 863 (Breyer, J., dissenting). Justice Stevens' dissent also recognized the reality that, for most States with discretionary supreme court review, the intermediate court's resolution of the federal claim would, from the State's perspective, certainly be adequate to avoid comity concerns that inform the exhaustion/procedural default requirements. 526 U.S. at 859 (Stevens, J., dissenting) The dissent, therefore, would conclude, at least as to "fact-intensive claims that fail to present any issue of broad significance," that presenting those claims to the state's highest court is not required, at least where the state supreme court's discretionary review rules contemplate that the court would not accept review of those claims. *Ibid.*

In these two decisions, the Court has endeavored to impose clear, workable rules to guide lower courts in the exhaustion/procedural default arena. This Court has rejected more ambiguous rules, reflected in the dissenting opinions in *Duncan* and *O'Sullivan*, in the interests of achieving prompt and simple resolution of exhaustion/procedural default issues. In *Duncan*, the dissent favored a rule that the Court should require the habeas petitioner to present only "the substance of a federal habeas corpus claim * * * to state courts." 513 U.S. at 367 (Stevens, J., dissenting). Yet the rule adopted by the *Duncan* majority, although criticized by the dissent as "hypertechnical," clearly serves the important interest of speeding along resolution of federal habeas claims without imposing undue requirements on prisoners litigating in state court. A "bright line" test that requires the state prisoner litigant to explicitly state that he is raising a claim under the federal constitution makes for prompt and simple resolution of any exhaustion and procedural default claims. That is no small achievement, and hardly an unworthy goal, in federal habeas litigation.

Similarly, in *O'Sullivan*, this Court adopted the bright line requirement that, where discretionary review of federal claims is available in a State's highest court, state prisoner litigants must present their federal claims to that court to satisfy exhaustion/procedural default requirements. The majority rejected the dissent's preferred case-by-case approach in favor of a rule that would serve the States' interests in diminishing the volume of cases a

state supreme court would have to consider, while also serving the federal interest in avoiding the necessity of trial courts becoming embroiled in controversies that a case-by-case analysis would create.

Although this Court has attempted to clarify what a state prisoner must assert in state court to satisfy federal habeas exhaustion/procedural default requirements, that attempt has met with little success. As discussed in the next section, the tests employed by a majority of circuit courts have not changed since *Duncan*. The majority of courts still deem exhaustion/procedural default requirements satisfied so long as they can conclude that the "substance" of the federal claim was presented to the state court. And some circuits, including the Ninth Circuit, will look to state lower court filings and trial court opinions to determine whether a state prisoner's ambiguous claim raised in the State's highest court is, indeed, a federal claim. Only two circuits appear to heed *Duncan*'s admonition that state prisoners wishing to raise federal claims in state court must "say so."

II. The federal circuits apply varying and inconsistent tests in determining whether a state prisoner has "fairly presented" a federal claim in state courts.

Notwithstanding this Court's clear direction in *Duncan* and *O'Sullivan*, the federal circuits utilize varying tests to determine whether a state prisoner has "fairly presented" his federal claim in state court so as to avoid procedural default of that claim in federal habeas. Only one of those tests truely applies the requirement that the

state prisoner explicitly set forth his federal claim in the State's highest appellate court.

A. The "strict presentation" test

Only two circuits appear to recognize that, since *Duncan*, a state prisoner in state court must identify clearly his claim as a federal one to satisfy the "fair presentation" requirement. "Fair presentation" may be satisfied by including a reference to the federal constitution or an authority that has decided the claim on a federal basis. The following cases demonstrate that approach:

- *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000), *cert. denied*, 531 U.S. 1193 (2001) (concluding, citing *Duncan,* that prisoner's habeas claim that jury instruction violated federal law was not exhausted where prisoner, on direct appeal, neither cited nor referred to federal law);
- *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002) ("In light of *Duncan*, we agree with the district court that Isaacs did not 'fairly present' to the state court a [federal claim where no] federal cases were cited, and no language was used by Isaacs which would have alerted the Georgia Supreme Court to the fact that Isaacs was asserting a federal constitutional claim, separate and independent from his [state] claim.").[7]

[7] The Eleventh Circuit, before *Duncan*, applied the four-factor *Daye* test in analyzing exhaustion questions. *See Watson v. Dugger*, 945 F.2d 367, 370 (11th Cir. 1991). In its post-*Duncan* decision in

B. The "whole record review" test

The First, Fifth, and Ninth circuits do not confine their inquiry to the pleadings filed by the state prisoner in the State's highest appellate court, but will consider lower court filings and documents as well to determine if the federal claim was identified there. If, on review, the court can determine that the petitioner raised the federal claim somewhere in the State's lower courts, it may conclude that the State's highest appellate court was "alerted" to the federal nature of the state prisoner's claim on appeal. Cases that exemplify that approach include:

- *Barresi v. Maloney*, 296 F.3d 48, 52 (1st Cir. 2002) (court will consider "pleading and filings submitted by a habeas petitioner to lower state courts * * * [as] 'a backdrop against which his later filings [must] be viewed.'") (citation omitted);
- *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (in determining whether prisoner had presented the "substance of the federal habeas claim to the highest state court" court will review prisoner's "state habeas application" in the state trial court, including attachments to the application);

Isaacs, however, the court did not cite *Watson* nor employ the *Daye* test in concluding that the prisoner there had not exhausted his federal claim in state court. Thus, that circuit appears to have recognized the change required by *Duncan* and modified its test accordingly.

- *Reese v. Baldwin*, 282 F.3d 1184 (9th Cir. 2002) (state prisoner "alerted" state supreme court to federal nature of his claim, where it was clear that the state post-conviction trial court had resolved the claim below citing federal authority).

C. The "substance of the claim" test

The Second, Third, Seventh, and Eighth Circuits appear to confine their analysis to the pleadings filed by the state prisoner in the state's highest appellate court. Those courts, however, apply a multi-factored test that permits the court to determine that the state prisoner has exhausted his federal claim without specifically identifying in the highest appellate court a federal constitutional provision or an authority construing the federal constitution. Examples of cases in which this approach was used include:

- *Ramirez v. Attorney General*, 280 F.3d 87, 90, 94–95 (2nd Cir. 2001) (holding that state prisoner's "letter application to the New York Court of Appeals for leave to appeal was sufficiently specific under the test established in *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc) [*cert. denied*, 464 U.S. 1048 (1984)], to likely alert that Court to the federal nature of Ramirez's claim"; under *Daye* test, state prisoner "alerts" highest court to federal nature of claim without citing specific provision of federal constitution by "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state

cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, [or] (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation)";

- *McCandless v. Vaughn*, 172 F.3d 255, 261 (3rd Cir. 1999) (the *Daye* test sets forth "some of the ways in which petitioners may communicate that they are asserting a federal claim without explicitly referencing specific portions of the federal constitution or statutes");
- *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001) (applying *Daye* test);
- *Barrett v. Acevedo*, 143 F.3d 449, 453–54 (8th Cir. 1998), *on reh.*, 169 F.3d 1155 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 846 (1999) (court states that "fair presentment" requires petitioner "to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent constitutional issue" in the state court, while also stating that it is only the "substance of his federal claim that must be fairly presented to the state court.").

What appears most clearly to divide the circuits in their exhaustion analysis is the extent to which *Duncan* has had any impact on that analysis. Several circuits do not even cite *Duncan*, let alone acknowledge that *Duncan* intended to require more specificity in state-

court pleadings. *See, e.g., Barresi*; *Ramirez*, 280 F.3d at 94–95. Others cite *Duncan,* but continue to rely on pre-*Duncan* tests that avoid any requirement that federal claims be expressly identified, seeking instead simply to discern whether the "substance" of the federal claim was presented in state court. *See, e.g., McCandless*, 172 F.3d at 261; *Barrett*, 143 F.3d at 453. In stark contrast, two circuits do recognize that, after *Duncan*, an exhaustion analysis for federal habeas purposes is limited to determining whether the state prisoner expressly stated the federal claim in state court by relying on a provision or authority construing a provision of the federal constitution. *See, e.g., Isaacs*; *Baker*.

III. The federal courts that do not apply a strict test for the "fair presentation" requirement fail to give proper respect to the policy of federal-state comity that underlies the exhaustion requirement.

Not only are the courts divided in their approach to the exhaustion analysis, but the tests that permit exhaustion by some means other than explicitly presenting the federal claim to the state appellate courts implicate important state and federal interests. In the first place, those tests are based on an inaccurate assumption about the workings of many state appellate courts. Typically, those federal courts that have excused a state prisoner's failure to present his claims clearly as federal claims in the state courts have based their analysis on an assumption that the state courts would (or could), in any event, have viewed these claims as federal constitutional claims. That assumption lacks merit where, as in Oregon and many

other States, appellate courts have placed renewed emphasis on *state* constitutional law. *See, e.g., State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983) (court addresses claims of constitutional error first under the state constitution before proceeding, if at all, to the federal constitution). Even assuming that claims like those asserting "deprivation of the right to cross examine witnesses" and "ineffective assistance of counsel" fairly could be said to alert a court that a constitutional claim is being raised, those claims do not alert the court that the claim is one arising under the *federal* constitution.[8]

Moreover, a test that requires a clear presentation of the federal claim in the state courts serves important state and federal interests. In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court explained the significant state interests involved as follows:

> This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. * * * This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. As we explained in *Rose* [*v. Lundy*, 455 U.S. 509 (1982)]:

[8] Article I, section 11, of the Oregon Constitution, for example, also entitles a criminal defendant to adequate assistance of counsel. *See Krummacher v. Gierloff*, 290 Or. 867, 871-72, 627 P.2d 458, 461-62 (1981).

> "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. * * * Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.' * * * Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

(Citations omitted.)

In *Coleman*, the Court rejected a broad rule that "would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds." 501 U.S. at 738. A primary reason for rejecting the proposed rule was that "it would place burdens on the States and state courts in exchange for very little benefit to the federal courts." *Ibid.* The Court recognized the burden federal habeas review places on the State, including the burden of responding to

the federal habeas claim, "the uncertainty and delay added to the [State's] enforcement of its criminal laws," and the cost of retrying the petition if the federal court reverses a conviction. *Id.* at 739. Finally, the Court recognized the important state interest in finality and the need for consistency "between the respect federal courts show for state procedural rules and the respect they show for their own." *Id.* at 751.

All of those interests are at issue in this case as much as in cases involving procedural default based on state court opinions that rest on independent and adequate state grounds. States are burdened as much by rules that excuse a habeas petitioner's failure to expressly present his federal claim first in the state courts as they are by the loose application of the presumption addressed in *Coleman.* A strict definition of what satisfies the "fair presentation" requirement similarly avoids bogging down federal courts in time-consuming and resource-draining procedural questions that serve only to further delay final resolution of prisoner litigation and fail to properly respect the role of the state appellate courts in resolving federal claims. In addition, a strict definition eliminates the uncertainty and inconsistency in results that plague federal habeas litigation not only between circuits, but even within circuits. *Compare, e.g., Barrett v. Acevedo* (prisoner exhausted Sixth Amendment Confrontation Clause claim in state court by challenging his lack of opportunity for cross-examination), *with Ashker v. Leapley*, 5 F.3d 1178 (8th Cir. 1993) (Confrontation Clause claim not exhausted in state court when prisoner argued that the introduction of hearsay evidence deprived him of a fair trial under the Fourteenth Amendment). As explained

below, this case presents an opportunity for this Court to reaffirm the principles it expressed in *Duncan, O'Sullivan,* and *Coleman* and provide a clear rule for when the "fair presentation" requirement is satisfied.

IV. The Ninth Circuit's decision provides the Court with an opportunity to clarify the proper test federal courts are to use in addressing exhaustion/procedural default questions.

In this case, the Ninth Circuit held that a federal habeas petitioner had fairly presented his federal claim of ineffective assistance of counsel—even though he mentioned his claim only once and only in his amended petition for post-conviction relief filed in the state trial court—because the trial court's written opinion cited federal authority in rejecting his claim. The Ninth Circuit deemed it insignificant for exhaustion purposes that the habeas petitioner, in both the state court of appeals and the state supreme court, had merely alleged that he had been denied effective assistance of appellate counsel, without indicating, by citation to a specific federal constitutional provision or any authority construing the federal constitution, that his claim was a federal one. Nor did he present any argument before either appellate court that could have alerted those courts to the federal nature of his claim.

Moreover, the Ninth Circuit misanalyzed this Court's recent cases addressing exhaustion/procedural default questions in other respects. Not only did the Ninth Circuit improperly consider documents other than those filed by the petitioner in the State's highest appellate court, more importantly it focused on the wrong ques-

tion. The question determinative to the Ninth Circuit was whether the state appellate courts had the bare opportunity to address Reese's claim as a federal one. Because the state appellate courts had that opportunity, regardless of what Reese included in his briefs, the Ninth Circuit concluded that Reese had fairly presented his claim to those courts. The Ninth Circuit explained:

> Comity requires only that we not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.
>
> Here, we conclude that the Oregon Supreme Court had that opportunity. A state supreme court certainly has the opportunity to read a petition for review *and* the lower court decision claimed to be in error before deciding whether to grant discretionary review. It is in this sense that we presume the Oregon Supreme Court read Reese's PCR court opinion. But assuming *arguendo* that the Oregon Supreme Court chooses not to read lower court opinions when deciding whether to grant review, it would not control our exhaustion analysis. For in that assumed case, that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue.

App-18 to App-19 (emphasis in original). What the Ninth Circuit has done is to reject the requirement that state appellate courts be provided with an opportunity to consider a federal claim before it can be raised in federal habeas, and instead to require only that state courts have

some ability to find the federal claim for themselves in the first instance.

As the dissent below properly noted, state appellate court "judges are not like pigs hunting for truffles buried in briefs." App-20 (citation and internal quotation marks omitted). Nor worse, buried in the record. Nor is it enough that they have the bare opportunity to address a claim as a federal one in that they can first identify that claim without any assistance from the state prisoner litigant. This Court has attempted to create a clear standard that enables exhaustion/procedural default questions to be answered by federal trial courts with minimal devotion of time or resources, while imposing little burden on state prisoners seeking federal habeas relief. But the burden properly rests on the state prisoner litigant to fairly present the federal claim to the state appellate court and to provide that court with the opportunity to address the claim by offering a clear indication that a federal claim is being raised.

This case thus presents the Court with the opportunity to clarify a question that plagues and divides the federal circuits. The resolution of that question will markedly affect the analysis that at least a majority of federal courts will employ in resolving exhaustion questions. Assuming the State is correct that *Duncan* did intend to "tighten the pleading screws," or that, even if it did not, those screws should be tightened, the analysis of exhaustion questions in the lower courts will be simple and expedient and will produce consistent results among the circuits. None of that is occurring at present, as an examination of the cases the State has cited in this petition will readily reveal. Imposing heightened pleading requirements on state prisoners is a small price to pay for

improved efficiency, increased economy, and respect for comity in federal habeas litigation.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
MICHAEL D. REYNOLDS
ROBERT B. ROCKLIN
Assistant Attorneys General
Counsel for Petitioner

December 2, 2002

APPENDIX A

Michael REESE, Petitioner-Appellant,
v.
George H. BALDWIN, Respondent-Appellee

No. 01-35153

United States Court of Appeals, Ninth Circuit

Argued and Submitted Nov.9, 2001

Filed March 12, 2002.

Dennis N. Balske, Assistant Federal Public Defender, Portland, OR, for the petitioner-appellant.

Robert B. Rocklin, Assistant Attorney General, Salem, OR, for the respondent-appellee.

Appeal from the United States District Court for the District of Oregon James A. Redden, District Judge, Presiding. D.C. No. CV-98-00851-ST.

Before: HUG, T.G. NELSON, and GOULD, Circuit Judges.

Opinion by Judge GOULD; Dissent by Judge T.G. NELSON.

GOULD, Circuit Judge:

OVERVIEW

Petitioner Michael Reese ("Reese") appeals the district court ruling that his claim of ineffective assistance of appellate counsel in his § 2254 habeas petition is procedurally defaulted because of lack of exhaustion. The

issue is whether Reese adequately alerted the state courts to the federal nature of his claims. We reverse the district court, concluding that Reese fairly presented his federal claims to the state courts, and we remand for further proceedings on his habeas petition.

PROCEDURAL HISTORY

I. Conviction and Direct Appeals

The story pertinent to this habeas appeal begins when Reese was convicted on two counts of kidnaping and one count of attempted sodomy in Oregon state court. The trial court sentenced Reese as a dangerous offender. This allowed the court to depart from the usual sentencing guidelines. The court issued a determinate sentence of thirty years on the kidnaping counts. That meant that Reese would have to serve the entire thirty years without eligibility for parole. The court also sentenced Reese to three years on the attempted sodomy count, a determinate sentence to be served consecutively to the one on the kidnaping counts. Facing a thirty-three year sentence with no possibility of parole, Reese thus far had not fared well.

The Oregon Court of Appeals affirmed the convictions. But it remanded for resentencing because Oregon law required the sentencing court to indicate what the presumptive sentence would have been had Reese not been sentenced as a dangerous offender, which the trial court hadn't done. Under Oregon law, Reese could have been eligible for parole after he served the presumptive term, and so this omission had potential impact on Reese's tenure as a convict.

On this first remand the court again sentenced Reese to thirty years on the kidnaping counts as a dangerous offender. And this time the court also specified the presumptive sentence that the court would have imposed if it had not found Reese to be a dangerous offender. However, as grist for the mill of further appeals, this presumptive sentence specified by the court was also a departure from the sentencing guidelines. Stated differently, the sentence that the court said it would have issued absent departure from the sentencing guidelines for a dangerous offender was itself also a departure from the sentencing guidelines. Again, Reese had not fared well.

But this use of a departure for the presumptive sentence was not permissible under Oregon law, and the Oregon Court of Appeals again remanded for resentencing. The appeals court noted that the correct presumptive sentence under the guidelines without departure should have been between 121 and 130 months. *See State v. Reese*, 876 P.2d 317, 319 (Or. Ct. App. 1994).

On the third sentencing after the second remand, the Oregon sentencing court appointed different counsel to represent Reese. Reese then objected to the new attorney and proceeded pro se. This time, facing the pro se Reese alone, the trial court did not sentence Reese as a dangerous offender. Instead, the court sentenced Reese to 260 months on the kidnaping convictions, plus the three year consecutive term for attempted sodomy. The length of the kidnaping sentence was a departure from the guidelines, though not for being a dangerous offender. Yet another time, Reese had not fared well. The Court of Appeals on the second appeal had stated that Reese when sentenced as a dangerous offender could be eligible for

parole after 11 years, the presumptive term. But on remand, in the third sentencing, the court abandoned dangerous offender status as the basis for departure, and departed on other grounds.

Reese appealed his sentence again for the third time and was appointed still another counsel. But Reese's appeal proceeded under an ill star. Reese's appellate counsel declined to champion Reese's position and filed a *Balfour* brief with the Oregon Court of Appeals suggesting that the appellate issues had no merit. The *Balfour* system is Oregon's version of the *Anders* briefing system announced in *Anders v. California*, 386 U.S. 738 (1967), through which appointed counsel present claims they conclude are frivolous.[1] The Oregon Court of Appeals on this third appeal affirmed Reese's sentence without written opinion. *See State v. Reese*, 894 P.2d 1268 (Or. Ct. App. 1995). Reese did not seek review by the Oregon Supreme Court. Thus ends the saga of Reese's direct appeal.

II. Post-Conviction Review

[1] Under the *Balfour* system, counsel files a brief notifying the court that counsel fees the appeal lacks merit. Counsel writes and signs Part A of the brief, which gives a statement of facts and procedural history. Counsel includes any issues that the appellant wishes to raise in Part B of the brief, which is signed by the appellant. Contrary to the system announced in *Anders*, Oregon's system does not require counsel to withdraw. Instead, counsel remains on hand to help the appellant with any issues appellant might want to raise. Additionally, unlike in *Anders*, an Oregon court presented with a *Balfour* brief does not engage in its own independent review of the entire record. *See State v. Balfour*, 814 P.2d 1069 (Or. 1991).

As is typical in Oregon, however, that was not the end of the matter. Reese filed a pro se petition for state post conviction relief ("PCR"). As it turns out, the tale of Reese's PCR process is the part of the state court proceedings that is most pertinent for our purposes in this appeal. The PCR court appointed still another new counsel for Reese. Counsel filed an amended petition raising a claim of ineffective assistance of appellate counsel, citing explicitly to the Sixth and Fourteenth Amendments of the federal constitution as well as to the Oregon constitution.[2] The PCR court denied the ineffective assistance of appellate counsel claim with a terse ruling, citing federal law authority. In its Memorandum of Opinion, beneath a heading "Adequate Appellate Counsel,"

[2] The amended petition stated:

> Petitioner was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that counsel on appeal failed to:
>
> a. Withdraw as attorney for Petitioner due to conflict of interest in that her husband . . . had been the attorney for prosecution three times on Petitioner's cases;
>
> b. Notify Petitioner in advance when she removed Petitioner's attorney David Allen, from Petitioner's case and became the attorney of record for Petitioner without Petitioner's consent;
>
> c. Raise issues that had been preserved for appeal;
>
> d. File a timely Notice of Appeal;
>
> e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

the court simply wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745 (1983)."[3] Reese again appealed, now in the PCR process.

Reese was appointed again still another counsel for the PCR appeal in the Oregon Court of Appeals. Reese's PCR appellate counsel filed a *Balfour* brief stating there were no meritorious claims, just as Reese's direct appeal counsel had done. For Part B of the *Balfour* brief, the section presenting the claims that counsel thought frivolous, counsel inexplicably attached Reese's pro se PCR petition rather than the amended petition that had been prepared by an attorney. As a result, the *Balfour* brief did not explicitly cite to federal authority for the ineffective assistance of appellate counsel claim, as the amended petition had done. The state filed a motion for summary affirmance, which Reese's attorney did not oppose. The Oregon Court of Appeals granted the motion, and summarily affirmed the PCR court's decision without a written opinion.[4]

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[3] Just above the court's decision on the appellate counsel claim was a separate heading entitled "Adequate Assistance of Counsel". Under that heading, another terse ruling stated, "Petitioner received adequate assistance of trial counsel," and cited *Strickland v. Washington*, 466 U.S. 668 (1984), the leading federal precedent establishing the standard for ineffective assistance of counsel under the Sixth Amendment, as well as citing "*Krummacher v. Gierloff*, 290 Or. 867 (1981)," an Oregon case analyzing ineffective assistance of counsel claims under both the federal and Oregon constitutions. *See Krummacher*, 627 P.2d 458, 461.

[4] The Court of Appeals issued an order granting the motion for summary affirmance and affirming the PCR court's decision:

> "Respondent has moved for summary affirmance pursuant to ORS 138.660 on the ground that this appeal presents no substantial question of law. Appellant has not opposed the motion. The motion is granted.
>
> "Affirmed."

Reese next filed a petition for review in the Oregon Supreme Court. This petition cited to the Sixth and Fourteenth Amendments of the federal constitution, but the citations appeared to support claims for ineffective assistance of trial counsel only. The sentence containing these citations stated, "Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated." Reese's claim alleging ineffective assistance of counsel on direct appeal was made summarily, along with many other claims. The petition contained no express citation to federal authority for the claim.[5] The Oregon Supreme Court denied review.

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[5] For convenience, we set fourth relevant parts of the petition, including the full argument section of the petition:

> **Statement of reasons for reversal of Court of Appeals**
>
> The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.
>
> **Statement of Facts**
>
> . . . Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury

III. Federal Habeas

With the past state court stage thus set, Reese filed in federal court a habeas petition and later an amended habeas petition alleging, among other claims, ineffective assistance of counsel on direct appeal. The case was referred to a federal magistrate judge, who in turn recommended finding that Reese fairly presented his claim of ineffective assistance of appellate counsel. The magistrate judge recommended granting relief for that claim and denying relief for Reese's other claims.[6] The district court rejected the magistrate judge's recommendation, held that Reese did not fairly present this claim of ineffective appellate counsel to the Oregon Court of Appeals, and held that the claim was procedurally defaulted.[7] The district court denied Reese's other claims, and rejected Reese's motion for reconsideration. Reese appeals the dismissal of his habeas petition.

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trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

Argument

The sentence levied upon the petitioner is improper in that Petition was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Petitioner asserts that his imprisonment is in violation of ORS 138.530. Petitioner alleges that the sentence violates his eighth amendment rights against cruel and unusual punishment. Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th, and 14th, amendment rights have been violated.

[6] The magistrate judge would have granted relief because she would have held Oregon's *Balfour* system unconstitutional. Because we find only that Reese exhausted his claim of ineffective assistance of appellate counsel, we do not have occasion to rule on the constitutionality of the *Balfour* system.

DISCUSSION

We review only the district court's determination that Reese procedurally defaulted his ineffective assistance of appellate counsel claim.[8]

I. Standard of Review

The district court's dismissal of a 28 U.S.C. § 2254 habeas claim on the ground of procedural default presents issues of law that we review de novo. *See La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001).

II. Exhaustion

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[7] The district court based its decision on our recent opinion in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). In *Lyons* we held that strict rules for fair presentation to state courts applied to pro se petitioners. *See Lyons*, 232 F.3d at 669.

[8] Accordingly, we do not now have occasion to review the merits of the ineffective assistance of appellate counsel claim or any other claims contained in Reese's habeas petition. If there was procedural default, a defaulted claim could be considered only with a showing of cause and prejudice, or a showing that refusing to hear the claim would result in a "fundamental miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). No serious contention of cause can be made here, since Reese had no right to counsel on his PCR appeals. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000). Reese does not argue that a fundamental miscarriage of justice would result from a procedural default.

A state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). Exhaustion is required by statute. *See* 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement of § 2254, habeas petitioners must fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' 'federal rights.'" *Lyons v. Crawford*, 232 F.3d 666, 668 (2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)).

The exhaustion requirement has long been rooted in our commitment to federalism, *see Ex Parte Royall*, 117 U.S. 241, 251 52 (1886), and it goes hand in hand with our respect for state court processes. State courts, like federal courts, may enforce rights under the federal constitution. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990).

If a habeas petitioner fails to exhaust a claim, it may be procedurally defaulted. A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848-49 (1999); *Francis v. Rison*, 894 F.2d 353, 354 (9th Cir. 1990). If Reese did not fairly present his claims to the Oregon courts, he procedurally defaulted them, because he is now barred by Oregon's time limits from

going back and trying again to exhaust them. *See* Or. Rev. Stat. § 138.071 (2001).

A. Scope of *Lyons*

Lyons carefully addressed and established helpful guidelines for assessing whether a federal claim was fairly presented in the state court. As we explained, "[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised in state proceedings specifically as federal claims." *Lyons*, 232 F.3d at 670 (emphasis original). "In short, the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law." *Id. Lyons* also makes clear that the specific allegation cannot be an implied one; there must be explicit reference to federal law. As we held in *Lyons*, "[A] federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one . . ." *Id.* at 669 (emphasis original).

The parties agree that Reese complied with *Lyons* at the PCR court, but the state argues that Reese did not satisfy *Lyons* at the Oregon Court of Appeals and the Oregon Supreme Court. So we must decide whether a habeas petitioner must comply with *Lyons* at every level of a state court system or if complying at one level — the PCR court — is enough.

In assessing the scope of the *Lyons* rule, it is noteworthy that in *Lyons*, the petitioner never cited to federal authority for his claims at any level of the state courts. *See id.* at 667. The state courts in *Lyons* never were

alerted to any explicitly federal issue. In contrast, it cannot be denied that Reese explicitly alerted the PCR court to his federal claim. *See supra*, n. 2. In addition, the PCR court decided the claim based on federal case law, first citing *Strickland* on the general issue of effective assistance at trial, and then *Jones v. Barnes* on effective assistance on appeal. *See supra*, n. 3 and accompanying text. And so we must address whether the *Lyons* requirement for fair presentation is met by an explicit assertion of a federal law violation at the PCR court level alone, or whether *Lyons* requires some level of explicit assertion at later stages of the state appellate process.

To exhaust a claim in the state courts, a habeas petitioner must, in addition to complying with *Lyons*, present that claim to the state's highest court, even if that court has discretionary control over its docket. *See O'Sullivan*, 526 U.S. at 845. If *Lyons* was intended only to ensure that the state has some chance to address a federal issue before the federal courts do so, then it might be satisfied by explicitly citing federal law once, to a lower-level court such as the PCR court. However, we reject that view. *Lyons* is properly read as part and parcel of exhaustion law. It is thus apparent that *Lyons's* requirement of explicitly presenting a federal claim must be satisfied at the highest levels of the state court system to ensure that possibilities of the state courts resolving federal issues relating to state prisoners have been truly exhausted.[9] A request to a lower court alone is not sufficient to exhaust prospects of state court relief on a fed-

[9] To exhaust is defined as "To use up completely (either a material or immaterial thing); to expend the whole of; to consume entirely." Oxford English Dictionary, Second Edition, 1989.

eral claim. To exhaust requires that the highest state court must be alerted to the specifically federal nature of the claim presented.

The United States Supreme Court has said that a habeas petitioner must give the state courts "one full opportunity" to decide a federal claim by carrying out "one complete round" of the state's appellate process in order to properly exhaust a claim. *O'Sullivan*, 526 U.S. at 845. *Lyons* held that a petitioner can exhaust a claim only by both raising the claim and explicitly indicating the claim is a federal one. *Lyons*, 232 F.3d at 669. The federalism policies underlying exhaustion and the concerns that underlie *Lyons* argue persuasively that explicitness is necessary not merely at any one state court level, but instead at the highest state court that hears such claims. Following and clarifying *Lyons*, we hold that a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it. Accordingly, presenting a federal claim explicitly at the PCR court in itself is not sufficient for exhaustion.

Rather, with this understanding of *Lyons*, the issue becomes whether Reese alerted the Oregon Supreme Court to the federal nature of his claim of ineffective assistance of appellate counsel. Because of Oregon's rules of appellate procedure, to resolve this issue we must address two distinct questions: (1) Was the federal nature of Reese's claim properly raised to the Oregon Court of Appeals; and (2) Did Reese also comply with *Lyons* at the Oregon Supreme Court?

B. Oregon Court of Appeals

Under Oregon law, claims may not be presented in a petition for review to the Oregon Supreme Court unless they are first raised in front of the Oregon Court of Appeals. *See* Or. R. App. P. 9.20(2); *State v. Castrejon*, 856 P.2d 616, 621-22 (Or. 1993). We must therefore determine whether Reese fairly presented his claim to the Oregon Court of Appeals before deciding that he fairly presented his claim to the Oregon Supreme Court. For if the federal claim was not presented to the Oregon Court of Appeals, the Oregon Supreme Court need not have considered that federal claim no matter how explicitly raised to it.

Here, Reese's brief to the appeals court lacked federal citations, but that is not dispositive of the issue under the unusual facts of this case. *Lyons* requires that a state court be explicitly alerted to the federal nature of a claim. But it does not necessarily require that federal citations be included in an opening brief or petition for review when a claim is expressly asserted and the federal nature of that claim is explicit from the face of the decision under review.

The PCR decision Reese was appealing, which the Oregon Court of Appeals affirmed without further reasoning, did explicitly cite federal law — *Strickland* and *Jones v. Barnes* — to support the denial of Reese's ineffective assistance claims. Oregon law requires the PCR court to "state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. § 138.640 (1999). Given that there is no other statement from the PCR court on the federal versus state nature of

Reese's claim, the citations to *Strickland* and to *Jones v. Barnes* in the PCR court's decision "state clearly" to any who read the decision that Reese presented a federal question and that the PCR court decided it on federal grounds.

Even though Reese's brief to the Oregon Court of Appeals did not cite federal authority on the issues now raised on federal habeas, Oregon's clear statement requirement and the PCR court's citations to *Strickland* and *Jones v. Barnes* placed the Oregon Court of Appeals on notice that it was reviewing a federal question that the PCR court decided on explicit federal grounds. So long as the Oregon Court of Appeals read the lower court's decision, it would have seen that Reese was raising a federal issue. Whatever else a state reviewing court might do, we are confident, as a ground of our decision, that the state reviewing court reads the decision it is reviewing before summarily affirming that decision.

To summarize our views: Reese raised the ineffective assistance of appellate counsel claim and cited federal authority in his petition to the PCR court. The PCR court cited only federal law in deciding the issue, and under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66.

C. Oregon Supreme Court

Because Reese presented the federal claim to the Oregon Court of Appeals, the Oregon Supreme Court in turn could review the claim if properly presented to the Oregon Supreme Court itself. The final and dispositive issue is thus whether Reese satisfied *Lyons* and fairly presented his claims at the Oregon Supreme Court. Reese cited the federal constitution in the argument section of his Oregon Supreme Court petition, but did so explicitly to support only claims other than ineffective assistance of appellate counsel. Here is the part of Reese's petition offering federal authority: "Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated."

A difficulty for Reese is that this sentence offers citations to support only those claims involving trial counsel, not appellate counsel. The rule is settled that citation to federal authority for one claim in a habeas petition is not transferred to all the other claims contained in the petition. *See Lyons*, 232 F.3d at 669-70. To fairly present a federal habeas claim to a state court, it is essential that the petitioner must in some way provide a reference to federal authority to support that particular claim. *See id.*

However, we reach here a firm and unmistakable conclusion that Reese nonetheless fairly presented his federal claim asserting ineffective appellate counsel to the Oregon Supreme Court. As we explained in our discussion of the review by the Oregon Court of Appeals, simply by reading the PCR court decision, the Oregon Supreme Court would have been alerted that the claim

for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law.

The question then is whether we should presume that the Oregon Supreme Court read the PCR court decision, which explicitly cited federal law. If the Oregon Court of Appeals had rendered a reasoned, substantive decision, it might be argued that we should presume only that a state supreme court would read the decision that it is asked to review — in this case, the Oregon Court of Appeals decision. But here, the Oregon Court of Appeals had granted a summary affirmance and did not speak to the merits except by affirming what the PCR court had said. We conclude that it is appropriate to presume that, when faced with a summary affirmance from the Oregon Court of Appeals, the Oregon Supreme Court would have read the PCR court's substantive decision. Any other conclusion would not do credit to the appellate review process. For whatever variations may be appropriate under discretionary state procedures, an appellate court cannot fairly review a decision without knowing its content.

Perhaps it might be argued to the contrary that the Oregon Supreme Court, having only discretionary jurisdiction, need not read the underlying court opinion before deciding whether to accept an appeal. The Oregon Supreme Court might decide a petition for review, the argument runs, based on what is in the petition and ponder the underlying opinion only if and after discretionary review is granted. Whatever the practical concerns underlying such a position, we reject it in principle. For even if review is discretionary, there is no way for the Oregon Supreme Court to exercise an informed discretion about accepting appeal unless it considers the con-

tent of the decision under review. A discretionary review is still to be a rational review.

But we need not go so far as to hold that a rational discretionary review process must always include some review of the underlying decision. For even if a state supreme court could rationally and fairly decide whether to grant review without reading the underlying opinion, it does not follow that a claim must be visible from the face of the underlying petition alone to be "fairly presented" for our purposes in assessing exhaustion. The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the State "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (emphasis and internal quotations omitted). *See also Lyons*, 232. F.3d at 668 ("To satisfy the exhaustion requirement of § 2254, habeas petitioners must 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights.'" (quoting *Duncan*, 513 U.S. at 365)). Comity requires only that we not rule if the state court has not had the opportunity first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.

Here, we conclude that the Oregon Supreme Court had that opportunity. A state supreme court certainly has the opportunity to read a petition for review and the lower court decision claimed to be in error before deciding whether to grant discretionary review. It is in this sense that we presume the Oregon Supreme Court read Reese's PCR court opinion. But assuming *arguendo* that the Oregon Supreme Court chooses not to read lower

court opinions when deciding whether to grant review, it would not control our exhaustion analysis. For in that assumed case, that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue.

Here, in summary, the PCR court decided the claim on the basis of federal law; Oregon's procedural rules put the reviewing courts on notice that the PCR court decision was required to state clearly its ground for decision; any review of the PCR court decision would have disclosed its federal law basis; and the Oregon Court of Appeals issued only a summary affirmance of the PCR court's decision. Under these circumstances, it must be presumed that, before deciding to deny discretionary review, the Oregon Supreme Court reviewed the PCR court decision that should have alerted the court to the federal nature of Reese's claim.

The Oregon Supreme Court was thus on notice of the specifically federal nature of Reese's claim of ineffective assistance of appellate counsel. We hold that Reese fairly presented his federal claim of ineffective assistance of appellate counsel to the Oregon Supreme Court and exhausted it.

CONCLUSION

We reverse the district court's dismissal of the claim of ineffective assistance of appellate counsel. We remand for further proceedings on that issue.[10]

REVERSED AND REMANDED.

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[10] We express no opinion on the merits of Reese's claim.

T.G. NELSON, Circuit Judge, dissenting:

I must respectfully dissent. I would affirm the district court on the ground that Reese procedurally defaulted his claim for ineffective assistance of appellate counsel by failing fairly to present it to the Oregon Supreme Court.

"Judges are not like pigs, hunting for truffles buried in briefs."[1] At least federal appellate judges are not, according to our precedent.[2] Yet the majority would hold state supreme court justices to a different standard — requiring them to root through the record for rare truffles of legal support that may complete an incompletely raised claim in one of the thousands of petitions they must decide whether to grant every year. And if they choose not to engage in this porcine behavior, they have, according the majority, chosen not to "take the opportunity" presented to them by a petitioner to review that petitioner's claim. The majority so holds despite clear and binding precedent regarding what constitutes fair presentation and despite clear Oregon procedural rules.

In order fairly to present a federal claim to state courts, a petitioner must "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief."[3] Thus, fair presentation requires the assertion of the facts and the law supporting each claim.

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[1] *Entertainment Research Group. Inc. v. Genesis Creative Group, Inc.* 122 F.3d 1211, 1217 (9th Cir. 1997) (internal quotation marks and citation omitted).

[2] *See, e.g., id.*

[3] *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

The majority concludes, and I agree, that fair presentation must occur at every level of the state post-conviction review process. Thus, we agree that Reese was required to present both the factual and legal support for his claim of ineffective assistance of appellate counsel in his petition for review before the Oregon Supreme Court. We disagree, however, on whether he did so.

Reese did not cite any federal basis for his claim of ineffective assistance of counsel before the Oregon Supreme Court. Thus, in my opinion, he failed fairly to present the claim to that court. The majority holds, however, that the fact that the first postconviction court cited federal cases in its rejection of the claim miraculously saves that claim from procedural default. The Oregon Supreme Court could have sifted through the record in Reese's case, the majority reasons, to find the legal support missing from the claim in his petition. Thus, Reese fairly presented his claim to the Oregon Supreme Court in the majority's opinion. To me, that is not fair presentation.

There are good reasons for requiring the citation of facts and law supporting a claim in order to deem it fairly presented and exhausted.[4] For one thing, too many petitions for review are presented to state courts[5] to expect judges and law clerks to search through the record to find support for a claim that is not presented. Departing from the requirements of fair presentation thus renders hollow

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[4] *See, e.g., Gray*, 518 U.S. at 162,; *Shumway*, 223 F.3d at 987.

[5] In 1998, 8,627 petitions for review were filed for state supreme court review in California; 1,366 in Arizona; 1,146 in Washington; and 962 in Oregon. *See* State Court Caseload Statistics, 1998, National Center for State Courts (1999).

our professed interest in providing state supreme courts with an opportunity to review federal claims. Practically, they will have no such opportunity if they are required to search the record each time an incompletely supported claim appears before them.

Oregon procedural rules governing the presentation of petitions for review to the Oregon Supreme Court also require presentation of the legal support for every claim in a petition. Oregon Rule of Appellate Procedure 9.05(3) requires that the petition contain:

> (a) A prayer for review.
>
> (b) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established, if review is allowed.
>
> (c) A concise statement of each reason asserted for reversal or modification of the decision of the Court of Appeals, including appropriate authorities.
>
> (d) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the Court of Appeals should not be restated.
>
> (e) A brief argument related to each reason asserted for review, if desired.
>
> (f) A statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court.

> (g) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.[6]

Thus, Oregon procedural rules also require the presentation of legal support for a claim in every petition for review.

Worthy of note is the fact that the rules also require that the court of appeals' decision accompany a petition but do not require the lower court's decision to accompany the petition. This makes sense — after all, the Oregon Supreme Court will be reviewing the decision of the court immediately below if it decides to grant the petition for review. This rule undermines the assumption of the majority in this case, however, that the Oregon Supreme Court will naturally look to the trial court's decision when deciding whether to grant a petition for review. The rule does not even require that the trial court opinion accompany the petition.

By dissenting, I do not mean to diminish the disturbing history of this case. The parade of lawyers assigned to Reese and the mistakes made in his representation are an embarrassment. However, the unfortunate history of this case does not merit the creation of an odd and unreasonable exception to the rules of fair presentation. There are good reasons for those rules. The old adage "hard cases make bad law" seems to apply here. I dissent.

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[6] Or. R.App. P. 9.05(3).

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MICHAEL REESE,
Petitioner,

vs.

GEORGE H. BALDWIN,
Respondent.

CV98-851-ST
OPINION AND ORDER

Dennis H. Balske
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204

Attorney for Petitioner

Hardy Myers
Attorney General
Douglas Y.S. Park
Assistant Attorney General
Department of Justice
1162 Court Street N.E.
Salem, Oregon 97310

Attorneys for Respondent

REDDEN, Judge:

Magistrate Judge Stewart filed her amended findings and recommendation on June 8, 2000. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). Decisions on dispositive issues under 28

U.S.C. § 636(b)(1)(B) are reviewed de novo. United States v. Raddatz, 447 U.S. 667, 673 (1980); Bhan v. NME Hospitals, Inc. 929 F.2d 1404, 1414 (9th Cir. 1991). When a party objects to any portion of the magistrate's findings and recommendation, the district court must make a de novo determination of that portion of the magistrate's findings and recommendation. 28 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); United States v. Remsing, 874 F.2d 614 (9th Cir 1989).

Respondent has timely filed objections to the amended findings and recommendation. Oral argument on respondent's objections was held on September 14, 2000. Respondent's supplemental brief on the issue of retroactivity was filed September 26, 2000, and petitioner's reply was filed on September 27, 2000. I have given the file of this case a de novo review.

A. Magistrate Judge's Findings and Reommendation.

In his amended petition, petitioner raised four grounds for relief: (1) ineffective assistance of trial counsel; (2) no knowing or voluntary waiver of right to counsel at his second resentencing; (3) vindictive sentences imposed at his second resentencing; and (4) ineffective assistance of appellate counsel in the direct appeal from his second resentencing.

On January 4, 2000, the Magistrate Judge entered a findings and recommendation on petitioner's amended petition. On March 15, 2000, respondent filed a motion for reconsideration. Upon reconsideration, the Magistrate Judge filed an amended findings and recommendation on

June 8, 2000. The amended findings and recommendation concluded that the amended petition should be denied on the first ground for relief, conditionally granted on the fourth ground for relief, and denied as premature on the second and third grounds for relief; and that the state of Oregon should be required to reinstate petitioner's direct appeal from his second resentencing and appoint counsel to represent him on that appeal.

B. Ineffective Assistance of Appellate Counsel.

In his fourth ground for relief, petitioner contends that his legal representation in his direct appeal from the second resentencing was unconstitutionally ineffective under Anders v. California, 386 U.S. 738 (1967), and Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746 (2000). The Magistrate Judge recommended that petitioner's petition be conditionally granted on this ground, and that his appeal be reinstated. The basis for the Magistrate Judge's recommendation was her finding that the appellate procedures set forth in State v. Balfour, and followed by petitioner's counsel in his appeal from the second resentencing, are unconstitutional under Anders and Smith v. Robbins.

In Smith v. Robbins, the Supreme Court reviewed Anders and subsequent cases on the issue of procedures for appointed attorneys representing indigent defendants on possibly frivolous appeals. The Court then analyzed the procedures adopted by California in 1979 in response to Anders (hereafter, the Wende procedures). The Court found the Wende procedures to be constitutional, reversing the Ninth Circuit's contrary holding. The Wende procedures at issue in Smith v. Robbins do not permit appeliate counsel to withdraw, but do require the appel-

late court to review the trial record. Oregon's response to Anders is the procedures [*sic*] set forth in Balfour. Balfour procedures also do not permit counsel to withdraw, but do not require the appellate court to review the trial record.

In adopting the Balfour procedures in 1991, the Oregon Supreme Court reasoned that "the federal constitution requires an Anders brief only when counsel seeks to withdraw." Balfour, 311 Or. at 450. The court went on to say that if counsel does not seek to withdraw, "the core constitutional concerns for which the Anders brief were designed disappear," and that

> [A]ppropriate procedures, other than an Anders brief, can meet Anders' central concern – that an indigent appellant in a criminal case shall receive legal representation and meaningful access to appellate review on terms essentially equal to the representation and access available to a nonindigent appellant.

Id. at 450-51. The Oregon Supreme Court noted specifically that under the Balfour procedures, "review of the entire record by the appellate court in the direct appeal is not required." Id. at 454.

The Magistrate Judge found that Smith v. Robbins clarifies (rather than states a new rule) that Anders procedures (which include a review of the trial record by the appellate court) are not limited to situations where counsel seeks to or is permitted to withdraw. The Magistrate Judge found that (1) the major difference between the Wende procedures approved in Smith v. Robbins and the Balfour procedures is the role of the appellate court; (2)

Smith v. Robbins clarifies that procedures permitting counsel to not raise or brief issues are constitutionally adequate only where the record will also be reviewed by the appellate court; and (3) this was the rule of [the] 1967 decision in Anders.

The Magistrate Judge therefore accepted petitioner's argument that he was denied effective assistance of appellate counsel because his counsel's appellate brief was prepared pursuant to the procedures set forth in Balfour. She found that Oregon's Balfour procedures are unconstitutional in that they do "not afford adequate and effective appellate review for criminal indigents." Amended F&R, p. 32. The Magistrate Judge determined that the fatal flaw in the Balfour procedures is that they do not require a second level of review of the trial record by the appellate court to ensure that appointed appellate counsel has properly determined that an indigent defendant's appeal is frivolous.

I agree with the Magistrate Judge that the U.S. Supreme Court's upholding of the Wende procedures in Smith v. Robbins is closely tied to the fact that the Wende procedures require the appellate court to conduct its own review of the record. Further, if the above reasoning is correct, a petitioner who had not procedurally defaulted a claim that the Balfour procedures are unconstitutional would prevail on the merits.

As discussed below, however, whether a two-tier review has always been required by Anders, with Smith v. Robbins simply clarifying the rule, is a more difficult question that leads in this case to the issue of whether relief can be granted to a petitioner on this basis in a collateral proceeding.

C. Retroactive Application of New Rule.

Neither party raised, briefed, or argued before the Magistrate Judge the issue of retroactive application of a new rule under Teague v. Lane, 489 U.S. 288 (1989). The issue also was not briefed or argued before this court until respondent raised it in oral argument and the court thereafter requested supplemental briefing.

Respondent argues that petitioner's request for a new appeal on the grounds that the appellate procedures outlined in Balfour are unconstitutional should be denied because Teague does not permit application of a new rule of criminal procedure in a federal habeas proceeding.

Petitioner responds that Teague restricts the availability of remedies to persons whose convictions have become final wen a new, more favorable, rule of criminal procedure is established. Petitioner argues that when his conviction became final, Anders was the law and Anders required a two-tier review. Thus, petitioner asserts, there is no new rule and no issue of retroactive application of a new rule, and Teague is not applicable.

The application of Teague is a threshold question in a federal habeas case. Goeke v. Branch, 514 U.S. 115, 117 (1995). Except for two limited exceptions, a state prisoner seeking federal habeas relief cannot benefit from a "new" court-made rule. Teague, 489 U.S. at 310. A new rule for Teague purposes is one where the result was not dictated by precedent existing at the time the defendant's conviction became final. Goeke, 514 U.S. at 118. The question, then, is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to

conclude that the rule [he] seeks was required by the Constitution." Saffle v. Parks, 494 U.S. 484, 488 (1990).

The purpose of the Teague doctrine is to ensure that state convictions are not invalidated by federal courts based upon principles of constitutional law of which the state courts were unaware at the time the convictions became final. Coe v. Thurman, 922 F.2d 528, 534 (9th Cir. 1990). The Teague inquiry is frequently stated in terms of whether the rule "imposes a new obligation on the States...." Id., Butler v. McKellar, 494 U.S. 407, 412 (1990). The Teague line of cases seeks to have new rules announced on direct review, instead of in collateral proceedings. Coe v. Thurman, 922 F.2d at 534.

At the time petitioner's conviction became final in July 1995, Anders was the law with respect to procedures for possibly frivolous indigent appeals, and Balfour was Oregon's response to Anders. Petitioner argues that Anders clearly and always required a two-tier review and that, as a result, Balfour has always been unconstitutional.

The pivotal question in this case, for purposes of a Teague analysis, is whether an Oregon state court considering petitioner's claim at the time his conviction became final in 1995 would have felt compelled by existing precedent to conclude that the rule petitioner now seeks was required by the Constitution. O'Dell v. Netherland, 521 U.S. 151, 156 (1997). On the one hand, there has never been an explicit holding from the Supreme court that a two-tier review is required to be a part of appellate procedures for indigent appeals, and Smith v. Robbins emphasizes the Court's position that states are free to adopt procedures for possibly frivolous indigent appeals

that differ from those set forth in Anders, as long as those procedures adequately safeguard a defendant's right to appellate counsel. Smith v. Robbins, 120 S.Ct. at 759. Because of the lack of an explicit holding and the ambiguity of Anders and subsequent cases on the issue of appellate court review of the record, a good argument can be made that Smith v. Robbins now requires a two-tier review, but that that requirement is a "new" rule for Teague purposes because it "break[s] new ground" and "impose[s] a new obligation on the State." Teague at 301. Further, a result is dictated by prior precedent only if the result was "apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997). Arguably the requirement of a two-tier review was not "apparent to all reasonable jurists," given the fact that the reasonable jurists of the Oregon Supreme Court in Balfour interpreted Anders to mean that an Anders brief (with a two-tier review) was required only when counsel sought to withdraw. Balfour at 450-51.

On the other hand, the Ninth Circuit has clearly indicated its position, although in dicta, that even prior to the Supreme Court's decision in Smith v. Robbins, an independent review by the state court judges was required by Anders. (The Ninth Circuit's statement to this effect appears in Robbins v. Smith, 152 F.3d 1062 (9th Cir. 1997), which was reversed on grounds unrelated to the statement in Smith v. Robbins, the Supreme Court case discussed above). In the context of discussing what the court believed to be in the infirmities of the Wende procedures with respect to the obligations of appellate counsel, the Ninth Circuit noted: "We only address the obligations of appellate counsel in this decision. Our opinion in no way relieves the state court judges of their obligation under Anders or Wende to conduct their own inde-

pendent review of the proceedings to decide whether the appeal is wholly frivolous." Robbins v. Smith, 152 F.3d at 1067 n.2.

In addition, although not discussed in the majority opinion, one of the dissenting opinions in the Supreme Court case of Smith v. Robbins refers to the Teague question raised by the state in that case, and notes that "[o]nce general rules are announced they do not become 'new' again with every particular violation that may subsequently occur." Smith v. Robbins, 120 S.Ct. at 773 (Souter, J., dissenting). Thus the dissent indicates that the majority opinion was premised on the court's determination that Teague did not bar consideration of issues of indigent appellate procedures in a collateral appeal because Smith v. Robbins did not announce new rules, but merely clarified existing rules. Thus, there is some support from both the Ninth Circuit and Supreme Court for the proposition that Anders required a two-tier review, and that subsequent cases interpreting Anders (including Smith v. Robbins) do not constitute "new" rules for purposes of Teague.

In conclusion, if the foregoing reasoning is correct and the claim was not procedurally defaulted, a petitioner bringing a claim in a collateral proceeding alleging the unconstitutionality of the Balfour procedures would prevail on the merits and would not be barred by Teague.

D. Procedural Default/Ineffective Assistance of Appellate Counsel.

In its objections and at oral argument on September 14, 2000, respondent continued to press its position that petitioner's claim of ineffective assistance of appellate counsel alleged in his PCR brief to the Oregon Court of appeals is procedurally defaulted. Respondent argues that

the Magistrate Judge erroneously determined the federal claim was properly before the Oregon Court of Appeals even though petitioner did not mention or cite to the federal constitution or any federal law.

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992). To satisfy the exhaustion requirement, a habeas petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995). Habeas corpus relief must be denied if the petitioner has procedurally defaulted on a claim in state court. Murray v. Carrier, 477 U.S. 478, 485 (1986). A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 734 n.1 (1991).

The Magistrate Judge found that petitioner's ineffective assistance of appellate counsel claim was both raised and decided at the PCR trial court level, where petitioner specifically invoked the Sixth and Fourteenth Amendments to the United States Constitution. Further, indicating that it was a "close call," the Magistrate Judge found that petitioner's claim had been exhausted because petitioner "did fairly present that claim to the Oregon court of Appeals." Amended F&R, p. 17. She found that although petitioner did not specifically mention federal law, he did his best in his portion of the Balfour brief (prepared following the appellate procedures set forth in

State v. Balfour, 311 Or. 434, 814 P2d 1069 (1991)) to point out the alleged failings of his appellate counsel and to raise those failings as a federal question. The Magistrate Judge concluded that his efforts were sufficient to "fairly present" the claim to the Oregon Court of Appeals and that, therefore, the claim was before the Oregon Supreme Court when it denied petitioner's petition for review.

I agreed with the Magistrate Judge on this issue until a November 13, 2000, decision by the Ninth Circuit Court of appeals made it clear that a procedural default had occurred here.

In Lyons v. Crawford, No. 99-17351, 2000 WL 1687808 (9th Cir. Nov. 13, 2000), the court held that a petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterizes the claims raised in state proceedings specifically as federal claims. Lyons at *3. The court explained that "the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law," even if the federal basis is self-evident. Id. since the petitioner in Lyons "did not identify explicitly the claims at issue as federal claims, in that he cited neither provisions of federal law nor decisions of federal courts," his claims were unexhausted and could not proceed in federal court. Id.

The Lyons court also rejected the petitioner's argument that the required level of explicitness is diminished for petitioners who argue pro se in state court. The court referred to its recent decision in Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999), wherein it held that the court is "not obliged to construe [petitioners'] papers liberally merely because [they were] proceeding pro se" in

state court. Lyons at *2 (quoting Gatlin at 889). The court further noted that the Gatlin court cited Rose v. Lundy, 455 U.S. 509, 520 (1982), for the proposition that the standards of explicitness apply equally to pro se litigants. Id. Therefore, the Lyons court concluded, "[t]he law of this circuit is plainly that a federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one – regardless of whether the petitioner was proceeding pro se." Id.

In this case, in his section of the Balfour brief, petitioner did not mention or cite to the federal constitution or any federal (or state) case law for his claim for ineffective assistance of appellate counsel. Further, petitioner is now barred by the time limits set forth in Oregon statutes from filing additional appeals on this claim. Or. Rev. Stat § 138.071 (1996). Thus, because of the holding of the Ninth Circuit in Lyons, I am compelled to conclude that petitioner's fourth ground for relief was not exhausted in the state courts, and is now procedurally defaulted.

E. Second and Third Grounds for Relief.

The Magistrate Judge recommended that petitioner's second and third grounds for relief (respectively, waiver of right to counsel and vindictive sentencing in his second resentencing) be denied as premature pending resolution of petitioner's reinstated direct appeal from his second resentencing. The Magistrate Judge found that the two claims had not been exhausted because they had not been presented to the Oregon Supreme Court, and therefore could not be resolved by a federal court in habeas proceeding.

Petitioner's second and third grounds will remain unexhausted, because I have concluded that petitioner is not entitled to reinstatement of his direct appeal from his second resentencing. Further, petitioner is now barred by the time limits in Oregon statutes from filing any additional appeals on these claims. Or. Rev. Stat. § 138.071 (1996). Thus, petitioner's second and third grounds for relief are procedurally defaulted and must be denied.

F. Conclusion

Based upon the foregoing, I adopt the Magistrate Judge's findings and recommendation that the amended petition be denied as to the first ground for relief. I decline to adopt the Magistrate Judge's findings and recommendation as to the second, third, and fourth grounds for relief; those claims are denied and the state of Oregon is not required to reinstate petitioner's direct appeal from his second resentencing.

IT IS SO ORDERED.

Dated this 27 day of November, 2000.

s/James A. Redden
James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL REESE,

Petitioner,

v.

GEORGE H. BALDWIN,

Respondent.

Civil No. 98-851 ST

Judgment

Based on the record,

IT IS ORDERED AND ADJUDGED that Petitioner's amended habeas corpus petition is denied and judgment is entered in favor of respondent.

IT IS SO ORDERED.

Dated this 6th day of December, 2000.

s/James A. Redden
James A. Redden
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL REESE,
Petitioner-Appellant,

v.

GEORGE H. BALDWIN,
Respondent-
Appellee.

No. 01-35153

D.C. No. CV-98-00851-DJ
District of Oregon, Portland

ORDER

Before: HUG, T.G. NELSON and GOULD, Circuit Judges.

Judges Gould and Hug have voted to deny the petition for panel rehearing, and Judge Nelson has voted to grant the petition for rehearing. Judge Gould has voted to deny the petition for rehearing en banc, and Judge Hug has recommended the same. Judge Nelson would vote to grant the petition for rehearing en banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote or the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing is DENIED. Appellant's Petition for Rehearing En Banc is also DENIED.

Supreme Court, U.S.
FILED

02 964 DEC 2 2002

OFFICE OF THE CLERK

No. 02-_____

In the Supreme Court of the United States

OCTOBER TERM, 2002

GEORGE BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL APPENDIX

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
MICHAEL D. REYNOLDS
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***Counsel of Record**

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL REESE,

Petitioner, Civil No. 98-851 ST

v.

GEORGE H. BALDWIN, FINDINGS AND RECOMMENDATION

Respondent.

DENNIS N. BALSKE
Assistant Federal Public Defender
101 S.W. Main St., Suite 1700
Portland, OR 97204

Attorney for Petitioner

HARDY MYERS
Attorney General
DOUGLAS Y.S. PARK
Assistant Attorney General
Department of Justice
1162 Court Street N.E.
Salem, OR 97310

Attorneys for Respondent

STEWART, Magistrate Judge.

Petitioner, an inmate at the Eastern Oregon Correctional Institution, brings this petition for writ of habeas

corpus pursuant to 28 U.S.C. § 2254. Currently before the court is petitioner's Amended Petition (#19).

BACKGROUND

Petitioner was convicted in 1991 on two counts of first-degree kidnapping and one count of first-degree attempted sodomy. Following a bench trial, petitioner was sentenced to a 30-year determinate sentence as a dangerous offender on each kidnapping count, to be served concurrently with each other. He was also sentenced to a 36-month sentence for attempted sodomy, to be served consecutively to the kidnapping sentences.

Petitioner directly appealed. In State v. Reese, 114 Or.App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for re-sentencing, holding:

> [The dangerous offender statute] provides a specific exception for treatment within the guidelines system for dangerous offenders. It provides that dangerous offender findings constitute a basis for a departure. Although the court may impose an indeterminate sentence on the basis of those findings, it must indicate the presumptive sentence that would have otherwise been imposed. The entire 30-year sentence does not necessarily have to be served because, once the presumptive sentence has been served, the offender becomes eligible for consideration for post-prison supervision.

Id. at 560 (citing O.R.S. 144.232(1)).

On March 4, 1993, represented by the same attorney who had represented him at trial and the first sentencing,

petitioner was re-sentenced to 30 years' imprisonment as a dangerous offender on the kidnapping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Petitioner again directly appealed. In State v. Reece, 128 Or.App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for re-sentencing. As the court stated: "The trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence. It failed to do so." Id. at 326, 876 P.2d at 319.

On September 9, 1994, petitioner was again re-sentenced. A different attorney was appointed to represent petitioner at the second re-sentencing. Petitioner objected to the new attorney, and ended up appearing *pro se* before the court. This time, the prosecutor dropped his request that petitioner be sentenced as a dangerous offender, and the court sentenced petitioner to a guidelines departure sentence of 260 months on each of the kidnapping convictions, to be served concurrently with each other. Petitioner again received a 36-month consecutive sentence for the attempted sodomy conviction.

Petitioner appealed his second re-sentencing. Petitioner's attorney on appeal filed a Balfour brief on petitioner's behalf.[1] The Oregon Court of Appeals affirmed

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[1] A Balfour brief, which is described and discussed in more detail below, essentially consists of two parts: (1) a statement of facts and procedural history which is prepared and signed by appellate counsel; and (2) a statement of claims or errors which is

without opinion. State v. Reese, 134 Or. App. 629, 894 P.2d 1268 (1995). Petitioner's counsel did not seek review by the Oregon Supreme Court.

Petitioner then filed a petition for state post-conviction relief ("PCR") in the Umatilla County Circuit Court. After a hearing, the post-conviction trial court denied relief. Petitioner appealed the denial of his PCR petition. Again, however, appointed counsel filed a purported Balfour brief on petitioner's behalf. The state moved the Oregon Court of Appeals for summary affirmance, which petitioner's attorney did not oppose. The Oregon Court Appeals granted the motion for summary affirmance, and the Oregon Supreme Court denied review.

Petitioner, appearing pro se, filed a Petition for Writ of Habeas Corpus in this court on July 13, 1998, asserting 11 grounds for relief. After appointment of counsel, he filed an Amended Petition on March 11, 1999, alleging the following four grounds for relief:

> Ground 1: [Petitioner] received ineffective assistance of trial counsel at trial, due to his counsel's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her.
>
> Ground 2: [Petitioner] did not knowingly, intelligently, and voluntarily waive his right to

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prepared and signed by the petitioner. See State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991).

> counsel at his most recent sentencing proceeding.
>
> Ground 3: The sentences for kidnapping imposed by the trial court at the most recent sentencing are vindictive, in violation of the Fifth Amendment Double Jeopardy clause.
>
> Ground 4: [Petitioner] received ineffective assistance from his appellate counsel, who refused to raise any issues, failed to raise two meritorious issues, failed to withdraw, and failed to exhaust [petitioner's] state remedies by refusing to file a petition for review in the Oregon Supreme Court.

Respondent moves to deny habeas corpus relief, contending that the claims alleged in petitioner's Amended Petition are procedurally defaulted and lack merit. Respondent also contends that to the extent the claims are not defaulted, the Oregon state court decisions denying relief on the claims are entitled to deference because they involve reasonable determinations of facts and applications of federal law.

LEGAL STANDARDS

I. Procedural Default

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). A prisoner satisfies the exaustion requirement by "fairly" presenting his claims to the highest state court with juris-

diction to consider them. Keeney, 504 U.S. at 9; Picard v. Connor, 404 U.S. 270, 276 (1971).

If it is clear that no state remedies remain available to the petitioner, the exhaustion requirement is satisfied. See Coleman v. Thompson, 501 U.S. 722, 732 (1991); see also Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983). Nevertheless, habeas corpus relief must be denied if the petitioner has procedurally defaulted on a claim in state court. When a habeas petitioner at one time could have raised his federal claim in state court but did not and is now barred from doing so by a state procedural rule, he has procedurally defaulted that claim. Murray v. Carrier, 477 U.S. 478, 485 (1986).

II. Relief on the Merits

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Ninth Circuit Court of Appeals provided a framework for analyzing state court decisions under this statute in Davis v. Kramer, 167 F.3d 494 (9th Cir.), pet'n for cert. filed, 67 U.S.L.W. 3570 (March 8, 1999). Under Davis:

> [A] state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at 500.

As the Ninth Circuit more recently noted, "[u]nfortunately, when a state court does not articulate the rationale for its determination, a review of that court's 'application' of clearly established law is not possible." Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) (citing Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, 119 S.Ct. 587 (1998)). "Thus, when confronted with a state court decision that does not provide the basis of its decision, we must determine whether, in light of an independent review of the record and the relevant federal law, the state court's resolution of a petitioner's claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id. (citing 28 U.S.C. § 2254(d)(1)). This is not the equivalent of applying a *de novo* standard of review to state court decisions. Id. at 1091 n.3.

DISCUSSION

I. Ground One – Ineffective Assistance of Trial Counsel

A. Procedural Default

Respondent contends that plaintiff procedurally defaulted his first ground for relief because he did not properly allege or specifically argue in the PCR proceeding that trial counsel failed to investigate the background and conduct of the chief prosecuting witness and failed to use damaging impeachment evidence against her. Respondent also contends that even if petitioner fairly presented this claim to the PCR trial court, the claim is still defaulted because it was not presented to the Oregon Supreme Court.

By respondent's own admission, however, petitioner alleged and argued in the PCR proceeding that his trial counsel failed to obtain the victim's reports and records which would have shown inaccuracies and false statements made by the victim at trial. He argued that counsel failed to question witnesses, object to witnesses who could not identify petitioner, and present witnesses who would have testified that the crimes could not have happened as the witness said. He testified specifically that this counsel told him that "[the victim] had already been convicted of giving false information to the police department." Resp. Ex. 117 at 9. To find on these facts that petitioner did not fairly present his ineffective assistance of trial counsel claim to the PCR trial court would be to engage in exactly the sort of "hairsplitting" recently condemned by the Ninth Circuit Court of Appeals. See, Weaver v. Thompson, - - - F.3d - - -, 1999 WL 1062837 *4 (9th Cir. November 24, 1999).

Not only did petitioner fairly present his ineffective assistance of counsel claim to the PCR trial court, he specifically raised the claim both on appeal to the Oregon Court of Appeals and in his petition for review before the Oregon Supreme Court. Although his counsel on appeal from the denial of PCR did not set forth a detailed factual argument in the petition for review, the petition nonetheless repeats the same claim(s) raised in the PCR petition, including the ineffective assistance of counsel claim. Ex. 128, pp. 3-9. As such, petitioner did not procedurally default his first ground for relief.

B. Relief on the Merits

Petitioner alleges that he received ineffective assistance of counsel at trial as a result of his attorney's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her. In his memorandum in support of his Amended Petition, petitioner argues specifically that trial counsel should have discovered and impeached the victim with information relating to: 1) a false fire complaint; 2) history of assaults; 3) an escape conviction; and 4) mental health and anger control treatment.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show both (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Chacon v. Wood, 36 F.3d 1459, 1463 (9th Cir. 1994). The first part of this test requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by

the Sixth Amendment." Strickland, 466 U.S. at 687. While this burden is not insurmountable, a strong presumption exists that counsel's conduct falls within "the wide range of reasonable professional assistance." Id. at 689; Wade v. Calderon, 29 F.3d 1312, 1316 (9th Cir. 1994) (quoting Strickland, 466 U.S. at 689), cert. denied, 513 U.S. 1120 (1995).

To establish the second prong of the Strickland test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In determining whether a defendant was prejudiced by ineffective assistance of counsel, the court should examine whether the "'result of the proceeding was fundamentally unfair or unreliable.'" United States v. Palomba, 31 F.3d 1456, 1460–61 (9th Cir. 1994) (quoting Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)).

Assuming that the exhibits attached to petitioner's memorandum are properly before this court, and further assuming that by failing to use the impeachment evidence against the victim trial counsel made errors so serious that he was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, I nevertheless find that petitioner could not show that he was prejudiced in any way by the alleged shortcomings. In light of petitioner's own inconsistent account of the event, even if the impeachment evidence cited by petitioner had been used at trial, it is not reasonably probable that the result of the proceedings would have been different. Accordingly, petitioner is not entitled to relief on his

claim that he received ineffective assistance of trial counsel.

II. Ground Four – – Ineffective Assistance of Appellate Counsel[2]

A. Procedural Default

Respondent contends that petitioner procedurally defaulted his ineffective assistance of appellate counsel claim because it was not properly alleged in his PCR petition and therefore was not actually litigated at the PCR trial court level. Even if the claim was properly raised before the PCR trial court, however, respondent further contends that it was nevertheless not "fairly presented" to the Oregon appellate courts.

Petitioner's ineffective assistance of appellate counsel claim was raised and decided at the PCR trial court level. The trial court received legal argument and evidence on the issue and directly addressed the claim in its Memorandum of Opinion. Ex. 123, p. 4.

The more difficult issue is whether the claim was "fairly presented" to Oregon's appellate courts. Section A of the brief on appeal prepared by petitioner's counsel, purporting to satisfy the minimal requirements of Balfour, fails to raise this claim. Section B of the brief, which ordinarily consists of the assignments of error and argument provided by the prisoner, merely repeats the same claims for relief alleged in the PCR petition. Those claims, however, include the following:

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[2] For reasons that will become clear below, the grounds for relief are considered out of order for the purposes of the procedural default analysis.

Second Claim For Relief: Ineffective Assistance of Appellate Counsel.

Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter a notice of my intention to appeal in the Oregon ruling to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on post-conviction.

Ex. 125, pp. 5-6.

Petitioner fared better in the petition for review filed with the Oregon Supreme Court. There his counsel at least mentioned the pertinent federal constitutional provisions. Ex. 127, pp. 2–3.

Although it is a close call, I find that petitioner fairly presented his ineffective assistance of counsel claim on appeal. As in Delgado v. Lewis, 181 F.3d at 1091, "[a]lthough petitioner did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738 (1967), his petition was sufficient to alert the state to both state and federal precedent

governing his claim of ineffective assistance of counsel, including Anders." Here petitioner asserted that his appellate counsel failed to raise issues that petitioner asked him to raise. That assertion is sufficient to alert the state court to "both state and federal precedent governing his claim of ineffective assistance of counsel." Id. Moreover, by granting the state's motion for summary affirmance on the basis that no substantial question of law was presented, the Court of Appeals made "a decision upon the merits of the appeal." O.R.S. 138.660. Accordingly, I find that petitioner did not procedurally default his ineffective assistance of appellate counsel claim.

B. Relief on the Merits

Petitioner contends that his representation during his direct appeal from the second re-sentencing was unconstitutionally ineffective under Anders v. California, 386 U.S. 738 (1967). In Anders, the Supreme Court instructed court-appointed counsel how to comply with the constitutional requirement of furthering a client's case after determining the appeal to lack merit:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it

> may grant counsel's request to withdraw and dismiss the appeal. . . .

Id. at 744.

The Oregon Supreme Court interpreted Anders in State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991). After reviewing the constitutional requirements of Anders in conjunction with the Oregon's disciplinary rules governing attorneys, the Balfour court held that a court-appointed appellate attorney "who, after a diligent examination of the whole record and appropriate consultation with defendant and trial counsel, is faced with a conclusion that only frivolous issues exist for appeal, has no mandatory ethical obligation to withdraw from the representation." Balfour, 311 Or. at 448, 814 P.2d at 1078. The court then concluded that in the absence of a duty to withdraw, an Anders brief is not constitutionally required. Id. at 450, 814 P.2d at 1079. The court explained its conclusion as follows:

> If, however, counsel does not seek to withdraw, the core constitutional concerns for which the Anders brief were designed disappear. First, there will be no danger of the indigent appellant's proceeding unrepresented through the appeal. Second, the appellate court will not need an Anders brief to assess whether to permit counsel to withdraw, because counsel will not have withdrawn.

Id. at 450-51, 814 P.2d at 1079.

The court then set forth the following procedures for the Oregon courts to follow with respect to direct criminal appeals by indigent persons with a constitutional right to counsel:

1. Appointed counsel shall file a timely notice of appeal (if one has not been filed before counsel was appointed) in all cases which the client wishes to take an appeal;
2. Appointed counsel shall review thoroughly the record and discuss the case with trial counsel and the client;
3. If counsel thereafter determines that there are no meritorious issues for appeal, counsel nonetheless shall seek to provide the "active advocacy" demanded by Anders to the fullest extent ethically possible. That can be done by filing an appellant's brief with the court that meets the following standards.
4. The appellant's brief shall be divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, shall contain no assignments of error or argument.
5. Counsel shall also determine whether the client seeks to raise with the court any issue that the lawyer has determined to be frivolous. If the client does not seek to raise any issue, then the appellant's brief shall be

comprised solely of Section A, as described above.

6. If the client seeks to raise one or more issues with the court that counsel considers to be frivolous, the brief shall contain a presentation of the issue or issues in a Section B. Section B of the appellant's brief, under those circumstances, shall raise any claim of error requested by the client.

7. Counsel shall provide the client with appropriate legal advice on these claims of error, but shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it. In so doing, counsel's role is limited to attempt to see to it that the client states the issues and arguments in proper appellate brief form and the brief is timely filed.

Id. at 450-51 (internal citations omitted). The case goes on to provide:

> The Court of Appeals shall consider and decide whatever issues are raised in these appeals in the same manner as it considers and decides issues that are raised in any other direct criminal appeal. The Court of Appeals is not required to search the record for error, whether an appeal is filed by a person who has appointed counsel or retained counsel, because a defendant represented by retained counsel would not necessarily receive such a review on appeal.

Id. at 452-53.

In a trio of recent cases, the Ninth Circuit Court of Appeals examined a very similar set of procedures used in the State of California pursuant People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979), and found them lacking under Anders. See Robbins v. California, 152 F.3d 1062 (9th Cir. 1998), cert. granted, 119 S.Ct. 1139 (1999); Davis v. Kramer, supra; Delgado v. Lewis, supra. California's procedure described in Robbins differs from Oregon's Balfour requirements only to the extent that after briefly outlining the facts surrounding the trial and failing to present any possible grounds for appeal, the California appellate counsel included a request that the court itself review the record for arguable issues. Robbins, 152 F.3d at 1064. Counsel also "pledged to remain 'available to brief any [issue(s)] upon invitation of the court.'" Id. A virtually identical procedure was described in both Davis and Delgado. In all three cases, the Ninth Circuit found that the California procedure essentially left the inmates to "shift for themselves," a situation that Anders specifically disapproved.

Oregon's Balfour procedure likewise fails to comport with the constitutional requirements set forth in Anders. If anything, the Oregon procedure provides even less protection to a petitioner than California's procedure. At least in California, the appellate court itself undertook an independent review of the record, a burden from which Balfour expressly relieves the Oregon appellate courts. As the Ninth Circuit pointed out in Robbins, "[o]ur opinion in no way relieves the state court judges of their obligation under Anders . . . to conduct their own independent review of the proceedings to decide whether the

appeal is wholly frivolous." Robbins, 152 F.3d at 1067 n.2.

Respondent attempts to distinguish the Balfour procedure from the California procedure condemned in Davis, Robbins, and Delgado. Respondent argues that instead of simply inviting the Oregon Court of Appeals to conduct an independent review of the record to see if it could find any constitutional violations as under Wende, appellate counsel here "assisted petitioner in preparing his brief, and included in it all the issues that petitioner wished to raise." This distinction, however, does not resolve the underlying lack of advocacy on the part of appellate counsel. As in Anders, Davis, Robbins, and Delgado, petitioner's appellate attorney did not identify any arguable appellate issues, but left petitioner essentially to "shift entirely for himself" and thereby failed to fulfill the "role of an active advocate" required by the constitution. Anders, 386 U.S. at 745.

According to Anders, the Balfour brief filed by petitioner's appellate attorney on direct appeal from the second re-sentencing does not satisfy federal constitutional standards. Accordingly, petitioner is entitled to a conditional writ of habeas corpus, whereby the State of Oregon should be required to reinstate petitioner's direct appeal from the second re-sentencing, and appoint new appellate counsel to represent him.[3]

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[3] Having found that petitioner's right to effective assistance of appellate counsel was violated, this court need not decide whether the violation resulted in prejudice to the petitioner. "[T]he failure of [petitioner's] counsel to raise arguable issues in the appellate brief creates a presumption of prejudice." Delgado, 181 F.3d at 1093

III. Grounds 2 and 3 – – Waiver of Right to Counsel and Vidictive Sentence

In his second and third grounds for relief, petitioner alleges that he did not voluntarily waive his right to counsel at the second re-sentencing, and that the second re-sentencing resulted in an unconstitutionally vindictive sentence. Neither of these grounds have been exhausted in state court.[4]

If the claims had been exhausted, or if the claims had addressed the legality of the conviction rather than the sentence, then it would be incumbent upon this court to decide those claims on the merits, notwithstanding the recommendation that the writ be conditionally granted on petitioner's ineffective assistance of counsel claim. See Robbins, 152 F.3d at 1068. Where, however, the claims have not been exhausted, a federal court should not "sit in place of the [Oregon] Court of Appeals in the first instance to determine whether petitioner was prejudiced as to any appellate issue." Penson, 488 U.S. at 87 n.9. Principals of comity dictate that the Oregon appellate courts first be given the opportunity to decide whether petitioner voluntarily waived his right to counsel at the second re-sentencing, and whether the second re-sentencing resulted in an unconstitutionally vindictive sentence. Accordingly, this court should not rule upon petitioner's second and third grounds for relief.

(citing Penson v. Ohio, 488 U.S. 75, 86 (1988)); Davis, 167 F.3d at 499).

[4] Petitioner attempted to raise both grounds in his portion of the Balfour brief filed on direct appeal, but he filed no petition for review with the Oregon Supreme Court. Thus, the issues were not fairly presented to Oregon's highest court.

RECOMMENDATION

Based on the foregoing, I recommend that the Amended Petition (docket #19) be DENIED on petitioner's first ground for relief, conditionally GRANTED on petitioner's fourth ground for relief, and DENIED as premature on petitioner's second and third grounds for relief. Accordingly, the State of Oregon should be required to reinstate petitioner's direct appeal from his second re-sentencing and to appoint counsel to represent petitioner on that appeal.

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due **January 24, 2000.** If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due no later than **February 10, 2000.** When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

DATED this 3rd day of January, 2000.

s/Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL REESE,

Petitioner, Civil No. 98-851 ST

v.

GEORGE H. BALDWIN,

Respondent. AMENDED FINDINGS AND RECOMMENDATION

DENNIS N. BALSKE
Assistant Federal Public Defender
101 S.W. Main St., Suite 1700
Portland, OR 97204

Attorney for Petitioner

HARDY MYERS
Attorney General
DOUGLAS Y.S. PARK
Assistant Attorney General
Department of Justice
1162 Court Street N.E.
Salem, OR 97310

Attorneys for Respondent

STEWART, Magistrate Judge.

Petitioner, an inmate at the Eastern Oregon Correctional Institution, brings this Amended Petition for Writ

of Habeas Corpus pursuant to 28 U.S.C. § 2254. On January 4, 2000, this court entered a Findings and Recommendation on petitioner's Amended Petition. On March 15, 2000, respondent then filed a Motion for Reconsideration of the Findings and Recommendation. Upon reconsideration, the Findings and Recommendation are hereby AMENDED as follows:

BACKGROUND

Petitioner was convicted in 1991 on two counts of first-degree kidnapping and one count of first-degree attempted sodomy. Following a bench trial, petitioner was sentenced to a 30-year determinate sentence as a dangerous offender on each kidnapping count, to be served concurrently with each other. He was also sentenced to a 36-month sentence for attempted sodomy, to be served consecutively to the kidnapping sentences.

Petitioner directly appealed. In State v. Reese, 114 Or. App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for re-sentencing, holding:

> [The dangerous offender statute] provides a specific exception for treatment within the guidelines system for dangerous offenders. It provides that dangerous offender findings constitute a basis for a departure. Although the court may impose an indeterminate sentence on the basis of those findings, it must indicate the presumptive sentence that would have otherwise been imposed. The entire 30-year sentence does not necessarily have to be served because, once the presumptive sentence has been served, the offender becomes eligible for consideration for post-prison supervision.

Id. at 560, citing O.R.S. 144.232(1).

On March 4, 1993, represented by the same attorney who had represented him at trial and the first sentencing, petitioner was re-sentenced to 30 years' imprisonment as a dangerous offender on the kidnapping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Petitioner again directly appealed. In State v. Reese, 128 Or. App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for re-sentencing. As the court stated: "The trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence. It failed to do so." Id. at 326, 876 P.2d at 319.

On September 9, 1994, petitioner was again re-sentenced. A different attorney was appointed to represent petitioner at the second re-sentencing. Petitioner objected to the new attorney, and ended up appearing *pro se* before the court. This time, the prosecutor dropped his request that petitioner be sentenced as a dangerous offender, and the court sentenced petitioner to a guidelines departure sentence of 260 months on each of the kidnapping convictions, to be served concurrently with each other. Petitioner again received a 36-month consecutive sentence for the attempted sodomy conviction.

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titioner's behalf.[1] The Oregon Court of Appeals affirmed without opinion. State v. Reese, 134 Or. App. 629, 894 P.2d 1268 (1995). Petitioner's counsel did not seek review from the Oregon Supreme Court.

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Petitioner filed a Petition for Writ of Habeas Corpus in this court on July 13, 1998, and an Amended Petition on March 11, 1999. His Amended Petition sets forth the following four grounds for relief:

> Ground 1: [Petitioner] received ineffective assistance of trial counsel at trial, due to his counsel's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her.

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[1] A Balfour brief, which is described and discussed in more detail below, essentially consists of two parts: (1) a statement of facts and procedural history which is prepared and signed by appellate counsel; and (2) a statement of claims or error which is prepared and signed by the petitioner. See State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991).

> Ground 2: [Petitioner] did not knowingly, intelligently, and voluntarily waive his right to counsel at his most recent sentencing proceeding.
>
> Ground 3: The sentences for kidnapping imposed by the trial court at the most recent sentencing are vindictive, in violation of the Fifth Amendment Double Jeopardy clause.
>
> Ground 4: [Petitioner] received ineffective assistance from his appellate counsel, who refused to raise any issues, failed to raise two meritorious issues, failed to withdraw, and failed to exhaust [petitioner's] state remedies by refusing to file a petition for review in the Oregon Supreme Court.

Respondent moves to deny habeas corpus relief, contending that the claims alleged in petitioner's Amended Petition are procedurally defaulted and lack merit. Respondent also contends that to the extent the claims are not defaulted, the Oregon state court decisions denying relief on the claims are entitled to deference because they involve reasonable determinations of facts and applications of federal law.

LEGAL STANDARDS

I. Procedural Default.

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). A prisoner satisfies the exhaustion requirement by

"fairly" presenting his claims to the highest state court with jurisdiction to consider them. Keeney, 504 U.S. at 9; Picard v. Connor, 404 U.S. 270, 276 (1971).

If it is clear that no state remedies remain available to the petitioner, the exhaustion requirement is satisfied. See Coleman v. Thompson, 501 U.S. 722, 732 (1991); see also Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983). Nevertheless, habeas corpus relief must be denied if the petitioner has procedurally defaulted on a claim in state court. When a habeas petitioner at one time could have raised his federal claim in state court but did not and is now barred from doing so by a state procedural rule, he has procedurally defaulted that claim. Murray v. Carrier, 477 U.S. 478, 485 (1986).

II. Relief on the Merits.

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

After the original Findings and Recommendations were filed, and, indeed, after respondent's Motion for Reconsideration and petitioner's response thereto were filed, the United States Supreme Court interpreted § 2254(d) in Williams v. Taylor, 120 S.Ct. 1495 (2000). The Ninth Circuit recently provided further guidance on the proper standards of review under § 2254(d) in Van Tran v. Lindsey, --- F.3d ---, 2000 WL 622070 (9th Cir. May 16, 2000).

Under Williams, a state court's decision can be "contrary to" federal law either:

> 1) if it fails to apply the correct controlling authority, or
>
> 2) if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result.

Van Tran, 2000 WL 622070 *3, citing Williams, 120 S.Ct. at 1519–20.

A state court's decision can involve an "unreasonable application" of federal law if it either:

> 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or
>
> 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.

Id.

The Ninth Circuit determined that a state court's decision involves an "unreasonable application" of clearly established federal law when "our independent review of the legal question does not merely allow us ultimately to conclude that the petitioner has the better of the two arguments, but rather leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred." Van Tran, at *7.

The appropriate source of law for determining "clearly established law as determined by the Supreme Court of the United States" is the holdings, as opposed to the dicta, of the Supreme Court. Williams, 120 S.Ct. at 1523. As the Ninth Circuit explains this limitation, "there is still a role for circuit law in habeas cases: we still look to our own law for its persuasive authority in applying Supreme Court law; however, only the Supreme Court's holdings are binding on the state courts and only those holdings need be 'reasonably' applied." Van Tran, at *7, citing Duhaime v. Ducharme, 200 F.3d 597, 600–01 (9th Cir. 1999).

Finally, the Ninth Circuit set forth a methodology for applying § 2254(d). "[W]hen analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)." Id., at *8.

Neither Williams nor Van Tran consider another difficulty encountered in applying § 2254(d), that is when

the state court decision is summarily made, without written opinion. As the Ninth Circuit has noted "[u]nfortunately, when a state court does not articulate the rationale for its determination, a review of that court's 'application' of clearly established law is not possible." Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999), cert. granted, judgment vacated on other grnds, 120 S.Ct. 1002 (2000). (citation omitted). "Thus, when confronted with a state court decision that does not provide the basis of its decision, we must determine whether, in light of an independent review of the record and the relevant federal law, the state court's resolution of a petitioner's claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., citing 28 U.S.C. § 2254(d)(1).

DISCUSSION

I. Ground One – Ineffective Assistance of Trial Counsel

A. Procedural Default

Respondent contends that plaintiff procedurally defaulted his first ground for relief because he did not properly allege or specifically argue in the PCR proceeding that trial counsel failed to investigate the background and conduct of the chief prosecuting witness and failed to use damaging impeachment evidence against her. Respondent also contends that even if petitioner fairly presented this claim to the PCR trial court, the claim is still defaulted because it was not presented to the Oregon Supreme Court.

By respondent's own admission, however, petitioner alleged and argued in the PCR proceeding that his trial

counsel failed to obtain the victim's reports and records which would have shown inaccuracies and false statements made by the victim at trial. He argued that counsel failed to question witnesses, object to witnesses who could not identify petitioner, and present witnesses who would have testified that the crimes could not have happened as the witness said. He testified specifically that his counsel told him that "[the victim] had already been convicted of giving false information to the police department." Resp. Ex. 117 at 9. To find on these facts that petitioner did not fairly present his ineffective assistance of trial counsel claim to the PCR trial court would be to engage in exactly the sort of "hairsplitting" recently condemned by the Ninth Circuit. See Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999).

Not only did petitioner fairly present his ineffective assistance of counsel claim to the PCR trial court, he specifically raised the claim both on appeal to the Oregon Court of Appeals and in his Petition for Review to the Oregon Supreme Court. Although his counsel on appeal from the denial of PCR did not set forth a detailed factual argument in the Petition for Review, the Petition for Review nonetheless repeats the same claim(s) raised in the PCR petition, including the ineffective assistance of counsel claim. Ex. 128, pp. 3-9. As such, petitioner did not procedurally default his first ground for relief.

B. Relief on the Merits

Petitioner alleges that he received ineffective assistance of counsel at trial as a result of his attorney's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her. In his memorandum

in support of his Amended Petition, petitioner argues specifically that his trial counsel should have discovered and impeached the victim with information relating to: 1) a false fire complaint; 2) assaultive history; 3) an escape conviction; and 4) mental health and anger control treatment.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show both (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Chacon v. Wood, 36 F.3d 1459, 1463 (9th Cir. 1994). The first part of this test requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. While this burden is not insurmountable, there is a strong presumption that counsel's conduct falls within "the wide range of reasonable professional assistance." Id. at 689; Wade v. Calderon, 29 F.3d 1312, 1316 (9th Cir. 1994) (quoting Strickland, 466 U.S. at 689), cert. denied, 513 U.S. 1120 (1995).

To establish the second prong of the Strickland test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In determining whether a defendant was prejudiced by ineffective assistance of counsel, the court should examine whether the "'result of the proceeding was fundamentally unfair or unreliable.'" United States v. Palomba, 31 F.3d 1456, 1460–61 (9th

Cir. 1994), quoting Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)).

Assuming that the exhibits attached to petitioner's memorandum are properly before this court, and further assuming that by failing to use the impeachment evidence against the victim, trial counsel made errors so serious that he was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, this court nevertheless finds that petitioner could not show that he was prejudiced in any way by the alleged shortcomings. In light of petitioner's own inconsistent account of the event, even if the impeachment evidence cited by petitioner had been used at trial, there is no reasonable probability that the result of the proceedings would have been different. Accordingly, petitioner is not entitled to relief on his claim that he received ineffective assistance of trial counsel.

II. Ground Four – – Ineffective Assistance of Appellate Counsel[2]

A. Procedural Default

Respondent contends that petitioner procedurally defaulted his ineffective assistance of appellate counsel claim because it was not properly alleged in his PCR petition and therefore not actually litigated at the PCR trial court level. Even if the claim was properly raised before the PCR trial court, however, respondent further contends that it was nevertheless not "fairly presented" to the Oregon appellate courts.

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[2] For reasons that will become clear below, the remaining grounds for relief are considered out of order for the purposes of the procedural default analysis.

Petitioner's ineffective assistance of appellate counsel claim was raised and decided at the PCR trial court level. The first amended PCR petition (which was prepared by counsel) specifically invoked the Sixth and Fourteenth Amendments to the United States Constitution and alleged that appellate counsel failed to "raise issues that had been preserved for appeal" or "obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal." Ex. 114, p. 5. The trial court received legal argument and evidence on the issue, and its Memorandum of Opinion directly addressed the claim. Ex. 123, p. 4 ("Appellate counsel need not present every colorable issue. Jones v. Barnes, 463 U.S. 745 (1983)").

The more difficult issue is whether the claim was "fairly presented" to Oregon's appellate courts. The brief on appeal to the Oregon Court of Appeals filed by petitioner's counsel, while purporting to satisfy the minimal requirements of Balfour (which are discussed in detail below), failed to do so. Section B of the brief, which ordinarily consists of the assignments of error and argument provided by the prisoner, merely repeats exactly the same claims for relief alleged in petitioner's original *pro se* PCR petition and in the *pro se* trial memorandum submitted by petitioner to the PCR trial court. However, those claims include the following:

> Second Claim For Relief: Ineffective Assistance of Appellate Counsel.
>
> Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter a notice of my intention to appeal in the Oregon ruling to the Oregon Supreme Court as I had informed their office by mail. Their response

was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's [sic] did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on post-conviction.

Ex. 125, pp. 5-6 (emphasis added).

Petitioner fared better in the Petition for Review filed by counsel with the Oregon Supreme Court. There, counsel at least mentioned the pertinent federal constitutional provisions. Ex. 127, pp. 2-3. However, claims may not be presented in a Petition for Review to the Oregon Supreme Court unless they are first raised before the Oregon Court of Appeals. Oregon Rules of Appellate Procedure 9.20(2); State v. Casterion, 317 Or. 202, 217, 856 P.2d 616 (1993). Thus, the issue is whether petitioner fairly presented his ineffective assistance of counsel claim to the Oregon Court of Appeals.

Although it is a close call, this court finds that petitioner did fairly present that claim to the Oregon Court of Appeals. As in another recent Ninth Circuit case, '[a]lthough petitioner did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738 (1967), his petition was sufficient to alert the state to both state and federal precedent

governing his claim of ineffective assistance of counsel, including Anders." Delgado v. Lewis, 181 F.3d at 1091. Petitioner, who is not a legal scholar, did his best to point out that his appellate counsel failed to raise issues on appeal and failed to timely file a notice of appeal to the Oregon Supreme Court. This is the same claim that was submitted to, and decided by, the PCR trial court. Petitioner no doubt expected the same consideration of this claim by the appellate courts, despite the obstacles presented by an inadequate Balfour brief on appeal.

Moreover, although the Oregon Court of Appeals granted the state's motion for summary affirmance on the basis that no substantial question of law was presented, the statute under which the affirmance was granted specifically provides that "[a] dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal." O.R.S. 138.660. Accordingly, petitioner did not procedurally default his ineffective assistance of appellate counsel claim.

B. Relief on the Merits

Petitioner contends that his representation during his direct appeal from the second re-sentencing was unconstitutionally ineffective under Anders, supra. Shortly after issuance of the original Findings and Recommendation in this case, the United States Supreme Court issued its decision in Smith v. Robbins, 120 S.Ct. 746 (2000), which modified the analysis of Anders-type claims of ineffective assistance of appellate counsel.

In Anders, the Supreme Court found inadequate California's procedure which permitted appellate counsel to withdraw upon filing a conclusory letter stating that the

appeal had "no merit" and permitted the appellate court to affirm the conviction upon reaching the same conclusion following a review of the record. It then set forth the following procedure to protect an indigent defendant's constitutional right to appellate counsel:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal. . . .

Anders, 386 U.S. at 744.

After reviewing the constitutional requirements of Anders in conjunction with the Oregon rules of professional conduct governing attorneys, the Oregon Supreme Court in Balfour, supra, rejected Anders as the only constitutional solution to the problem of frivolous appeals by indigent defendants. It held that a court-appointed appellate attorney "who, after a diligent examination of the whole record and appropriate consultation with defendant and trial counsel, is faced with a conclusion that only frivolous issues exist for appeal, has no mandatory ethical obligation to withdraw from the representation." Balfour, 311 Or. at 448, 814 P.2d at 1078. It reasoned

that an Anders brief was required only when counsel was seeking to withdraw from representation. Therefore, in the absence of a duty to withdraw, the court concluded that there is no constitutional requirement for an Anders brief, explaining:

> If, however, counsel does not seek to withdraw, the core constitutional concerns for which the Anders brief were designed disappear. First, there will be no danger of the indigent appellant's proceeding unrepresented through the appeal. Second, the appellate court will not need an Anders brief to assess whether to permit counsel to withdraw, because counsel will not have withdrawn.

Id. at 450-51, 814 P.2d at 1079.

The court then fashioned the following procedure for appointed counsel representing indigent persons in Oregon with a constitutional right to counsel in their criminal appeal:

> 1. Appointed counsel shall file a timely notice of appeal (if one has not been filed before counsel was appointed) in all cases which the client wishes to take an appeal;
>
> 2. Appointed counsel shall review thoroughly the record and discuss the case with trial counsel and the client;
>
> 3. If counsel thereafter determines that there are no meritorious issues for appeal, counsel nonetheless shall seek to provide the "active advocacy" demanded by Anders to the fullest extent ethically possible. That can be done by

filing an appellant's brief with the court that meets the following standards.

4. The appellant's brief shall be divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, shall contain no assignments of error or argument.

5. Counsel shall also determine whether the client seeks to raise with the court any issue that the lawyer has determined to be frivolous. If the client does not seek to raise any issue, then the appellant's brief shall be comprised solely of Section A, as described above.

6. If the client seeks to raise one or more issues with the court that counsel considers to be frivolous, the brief shall contain a presentation of the issue or issues in a Section B. Section B of the appellant's brief, under those circumstances, shall raise any claim of error requested by the client.

7. Counsel shall provide the client with appropriate legal advice on these claims of error, but shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it. In so doing, counsel's role is limited to attempt to see to it that the client states the issues and arguments

> in proper appellate brief form and the brief is timely filed.

Id. at 450-51, 814 P.2d at 1080 (internal citations omitted).

In essence, counsel avoids any ethical prohibition against advancing issues of questionable merit by not arguing them, but simply assists the client in preparing that portion of the brief raising such issues which counsel does not sign. Under these procedures, the court determined that review of the entire record by the appellate court is not required:

> The Court of Appeals shall consider and decide whatever issues are raised in these appeals in the same manner as it considers and decides issues that are raised in any other direct criminal appeal. The Court of Appeals is not required to search the record for error, whether an appeal is filed by a person who has appointed counsel or retained counsel, because a defendant represented by retained counsel would not necessarily receive such a review on appeal.

Id. at 452-53, 814 P.2d at 1080.

In its original Findings and Recommendation, this court concluded that the Balfour procedure fell short of the protections constitutionally mandated by Anders. Notwithstanding the apparent statements in Anders to the contrary, however, the Supreme Court in Smith held that Anders did not mandate a particular procedure. Rather, the Court defined the procedure described in Anders as "a prophylactic one; the States are free to adopt different

procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel." Smith, 120 S.Ct. at 753. "A State's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." Id. at 759 (footnote and citations omitted). Moreover, "[i]n determining whether a particular state procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve — to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required . . . and also to enable the State to 'protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.'" Id. at 760 (citation omitted).

Examining the new procedures adopted in response to Anders by the State of California in People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979), the Court found they comported with constitutional requirements for effective appellate counsel on direct appeal. Given the gravity of the question involved and the explicit directive in Smith that each state's procedures be examined separately, Balfour must undergo the same examination here.

The California procedures as described in Wende are remarkably similar to those set forth in Balfour, although with one crucial difference. The duties of appellate counsel under Wende are virtually identical to Balfour: appointed appellate counsel must attest that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a *pro se* supplemental brief. Smith, 120 S.Ct. at 753. In the submission to the court, after briefly outlining the facts surrounding the trial and failing to present any possible grounds for appeal, appellate counsel includes a request that the court itself review the record for arguable issues. Id. Counsel neither explicitly states that his review has led him to conclude that an appeal is frivolous nor requests to withdraw. Id. "Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing." Id. (citations omitted).

The duty of the appellate court is where the Wende and Balfour procedures diverge. In California, upon receipt of a Wende brief, the appellate court is obligated to review the entire record, regardless of whether the defendant has filed a *pro se* brief. Id. (citations omitted). If the appellate court, after its review of the record pursuant to Wende also finds the appeal to be frivolous, it may affirm. Id. (citations omitted). If, however, it finds an arguable (i.e., nonfrivolous) issue, it orders briefing on that issue. Id. (citations omitted). As noted above, under Balfour the Oregon courts undertake no such independent review of the record. Rather, they consider and decide the appeal solely on the issues raised in the Section B portion of the brief, presumably without the benefit of additional briefing should any of those issues prove nonfrivolous.

The Wende procedure was analyzed in Smith in light of several factors considered in prior cases in which the constitutionality of various appellate procedures was addressed. First, the Court noted that a significant factor in Anders was that the procedure condemned there "did not

require either counsel or the court to determine that the appeal was frivolous; instead, the procedure required only that they determine that the defendant was unlikely to prevail upon appeal." Id. at 761 (citations omitted). Wende, by contrast, requires both counsel and the court to find the appeal frivolous. Id. Under Balfour, however, only counsel makes the determination that the appeal is frivolous. The Court of Appeals is simply required to "consider and decide whatever issues are raised in these appeals the same manner as it considers and decides issues that are raised in any other direct criminal appeal." Balfour, 311 Or. at 452-53, 814 P.2d at 1080.

Because the Court referred to "counsel or the court," rather than "counsel and the court," respondent argues that a determination by appellate counsel that no nonfrivolous issues exist for appeal is sufficient without requiring a second tier of review by the appellate court. This argument is not supported by other language in Smith clearly requiring at least two tiers of review before a state system will pass constitutional muster.

The Court specifically noted that procedures previously found unconstitutional provide only a single tier of review. Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958) (trial judge made sole determination whether appeal should proceed); Lane v. Brown, 372 U.S. 477 (1963) (public defender could preclude defendant from appealing by refusing to request transcript). In contrast, the Wende procedure "does not suffer from this flaw, for it provides at least two tiers of review." Smith, 120 S.Ct. at 762. The lack of a separate review of the record by the appellate court under Balfour results in a single tier of review.

The Court also compared Wende favorably to a Wisconsin procedure approved by McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429 (1988). Wisconsin adopted a rule that required an Anders brief filed by court-appointed counsel to include a discussion of why the issues raised in the brief lacked merit. Presumably, the appellate court reviewed only the parts of the record cited by counsel in support of the "arguable" issues he raised.[3] Smith, 120 S.Ct. at 763. Giving perhaps the most specific direction to the appellate courts as to their function, the Court in McCoy stated:

> Unlike the typical advocate's brief in a criminal appeal, which has as its sole purpose the persuasion of the court to grant relief to the defendant, the Anders brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated. To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.

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[3] Despite this characterization in Smith, McCoy arguably does not support such a presumption. The Court's statement there that "[o]nce the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied" can be read as implying that the court did undertake a separate review of the record. McCoy, 486 U.S. at 444.

* * *

> Once the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied and the case may be disposed of in accordance with state law. Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits.

McCoy, 439 US at 442-44.

Wende, "by contrast, requires a more thorough treatment of the record by both counsel and court." Smith, 120 S. Ct. at 763 (citation omitted). The Oregon Balfour procedure, on the other hand, provides neither the protection of a legal explanation from counsel as to why the appeal is frivolous nor an independent second examination of the record by the appellate court.

Another significant factor discussed in Smith was the condemnation in Anders of the procedure which allowed a one paragraph letter from counsel stating only his "bare conclusion" that the appeal had no merit. Noting the difficulty of severing this issue from the Anders objection to the lack of a finding of frivolity, the Court nevertheless notes that the Wende brief provides more than a one-paragraph "bare conclusion." Id. "Counsel's summary of the case's procedural and factual history, with citations of the record, both ensures that a trained legal eye has searched the record for arguable issues and assists the reviewing court in its own evaluation of the case." Id.

(emphasis added). Again, although Balfour requires counsel to submit a procedural and factual history, with citations to the record, the critical missing factor is the lack of evaluation of the case by the appellate court to determine if there are any arguable issues that have been overlooked by counsel.

Even if a second tier of review is required, respondent relies on the conclusion in Balfour that the Oregon statutory PCR procedures with assistance of court-appointed counsel "is a constitutionally sufficient additional safeguard to assure that appellate counsel's judgment that there are no non-frivolous issues for appeal was correct." Balfour, 311 Or. at 453-54, 814 P.2d at 1081. However, that argument ignores a crucial difference between a direct appeal and PCR. A defendant has the constitutional guarantee of the right to adequate assistance of appellate counsel on direct appeal, but not for state collateral proceedings or federal habeas corpus proceedings. Bonin v. Vasquez, 999 F.2d 425, 430 (9th Cir. 1993).

If appellate counsel fails to raise arguable issues on direct appeal, then PCR counsel should raise the issue of ineffective assistance of appellate counsel. However, there is no guarantee that appointed PCR counsel will provide any more assistance that was provided by ineffective direct appeal counsel. Both could file Balfour briefs, as was done in this case. Yet the ineffectiveness of PCR counsel does not excuse the procedural default caused by that counsel, which may doom valid claims overlooked by that counsel. Coleman v. Thompson, 501 U.S. at 752 (PCR appellate counsel's failure to file timely notice of appeal does not constitute cause to ex-

cuse the procedural default because there is no constitutional right to PCR counsel). If Oregon accepts the benefits of the law governing procedural default due to PCR counsel's failure to exhaust a federal constitutional claim, then it should not be permitted to skirt its obligation to provide the required second tier of review on direct appeal by relying on non-constitutionally mandated PCR counsel.

Admittedly, an independent review of the record for points of arguable error is a function that the appellate court performs for no other class of appellants. When no arguable issues are raised by court-appointed counsel, an indigent defendant could secure a more complete review than a non-indigent defendant whose retained counsel raises some meritorious points. The latter is not entitled to the court's independent review to raise other arguable points that retained counsel may have overlooked. However, Anders and Smith are grounded more on ensuring the right to effective counsel than on equal protection concerns. Martha C. Warner, Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others', 23 FLA ST U L REV 625, 641–42 (1996).

Yet another significant factor discussed by Smith relates to the prior practice of allowing counsel to withdraw. The pre-Anders practice permitted an appellate court to allow counsel to withdraw and thereafter to decide the appeal without appointing new counsel. As the Court noted, any doubt as to the constitutionality of this practice was resolved in Penson v. Ohio, 488 U.S. 75, 82–83 (1988), which struck down a procedure that allowed counsel to withdraw before the court had determined whether counsel's evaluation of the case was accurate, and also allowed a court to decide the appeal without counsel even if the court found arguable issues. Smith, 120 S.Ct. at 761.

The Penson procedure violated the right described in Douglas v. California, 372 U.S. 353 (1963), to have counsel until a case is determined to be frivolous and to receive a merits brief for a nonfrivolous appeal. Id. By contrast, the Wende procedure does not violate this right, "both because counsel does not move to withdraw and because the court orders briefing if it finds arguable issues." Id. (citations omitted, emphasis added). As with the Wende procedure, counsel does not move to withdraw under the Balfour procedure. However, because the court does not undertake an independent review of the record, the Oregon Court of Appeals has no commensurate procedure to order briefing if it finds arguable issues. Rather, it simply considers and decides the issues raised in the Section B portion of the brief.

As noted above, the Oregon Court of Appeals did not issue a written opinion disposing of petitioner's appeal from the denial of his PCR claim that he received ineffective assistance of appellate counsel on direct appeal from the second re-sentencing. Having thus undertaken an independent review of the record and the relevant federal law, however, it is apparent that the Oregon Court of Appeal's resolution of this claim was indeed an unreasonable application of clearly established federal law. A comparison between Oregon's procedure under Balfour and those previously considered by the United States Supreme Court, particularly California's Wende procedure at issue in Smith, demonstrates that Oregon's Balfour procedure does not afford adequate and effective appel-

late review for criminal indigents. The next issue is whether petitioner is entitled to a conditional writ of habeas corpus, requiring the State of Oregon to reinstate petitioner's direct appeal from the second re-sentencing and to appoint new appellate counsel to represent him. Respondent argues that petitioner first has another hurdle to overcome, namely that he did in fact receive ineffective assistance of counsel under the Strickland standard of review.

Because petitioner did not receive the protections of a procedure that is constitutional under Anders and the other precedents, and therefore did not receive all the procedural protection required by the Constitution, prejudice must be presumed. Penson, 488 US at 85-89. Smith did not presume prejudice because it found the Wende procedure constitutionally valid; instead, Smith applied the Strickland standard of review. Here, unlike the Wende procedure, the Balfour procedure is constitutionally infirm due to the lack of appellate court review. Although counsel did not actually withdraw, as in Penson, petitioner suffered the equivalent of a denial of assistance of counsel who failed to present any issues on his behalf, knowing full well that the Oregon Court of Appeals would not independently evaluate the case for arguable issues overlooked by counsel. Therefore, it is premature to determine if petitioner received ineffective assistance of counsel under the Strickland standard of review. Instead, prejudice must be presumed until the Oregon Court of Appeals first complies with the federal constitutional requirements. Accordingly, petitioner is

entitled to a conditional writ of habeas corpus with respect to ground four.[4]

III. Grounds 2 and 3 – – Waiver of Right to Counsel and Vindictive Sentence

In his second and third grounds for relief, petitioner alleges that he did not voluntarily waive his right to counsel at the second re-sentencing, and that the second re-sentencing resulted in an unconstitutionally vindictive sentence. Neither of these grounds have been exhausted in state court. Petitioner attempted to raise both grounds in his portion of the Balfour brief filed on direct appeal, but no Petition for Review was filed with the Oregon Supreme Court. Thus, the issues were not fairly presented to Oregon's highest court.

Were this a situation where the claims had been exhausted, or where the claims addressed the legality of the conviction rather than the sentence, it would be incumbent upon this court to decide them on the merits, notwithstanding the recommendation that the writ be conditionally granted on petitioner's ineffective assistance of counsel claim. See Robbins v. Smith, 152 F.3d 1062, 1068 (9th Cir. 1999), rev'd on other grounds by Smith v. Robbins, supra. Where, however, the claims have not been exhausted, this court should not "sit in place of the [Oregon] Court of Appeals in the first instance to deter-

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[4] If the appellate court independently reviews the record and finds any arguable issue for appeal which is not procedurally barred, then the issue can be briefed on the merits and decided by the appellate court. That procedure necessarily would obviate any constitutional claim by petitioner for ineffective assistance of appellate counsel except for procedural errors.

mine whether petitioner was prejudiced as to any appellate issue." Penson, 488 U.S. at 87, n.9.

Principals of comity dictate that the Oregon appellate courts first be given the opportunity to decide whether petitioner voluntarily waived his right to counsel at the second re-sentencing and whether the second re-sentencing resulted in an unconstitutionally vindictive sentence. Accordingly, this court should not rule upon petitioner's second and third grounds for relief, but should await resolution of petitioner's reinstated direct appeal from his second re-sentencing.

RECOMMENDATION

Based on the foregoing, this court recommends that the Amended Petition (docket #19) be DENIED on the first ground for relief, conditionally GRANTED on the fourth ground for relief, and DENIED as premature on the second and third grounds for relief. Accordingly, the State of Oregon should be required to reinstate petitioner's direct appeal from his second re-sentencing, and counsel should be appointed to represent him on that appeal.

SCEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due **June 26, 2000.** If no objections are filed, then the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after receipt or no later than **July 14, 2000.** When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

DATED June 8, 2000.

s/Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

Supreme Court, U.S.
FILED
APR 21 2003
OFFICE OF THE CLERK

No. 02-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2002

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

BRIEF IN OPPOSITION

Dennis N. Balske
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Respondent

QUESTION PRESENTED

The principles of comity and federalism that underlie the longstanding exhaustion doctrine require that federal constitutional claims first be raised in state court. Exhaustion requires a state prisoner to fairly present his claim to the state's highest court, and fair presentation requires the prisoner to alert the state court that the claim is a federal one. *Duncan v. Henry*, 513 U.S. 364 (1995); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Are comity and federalism offended where, in deciding a fact-intensive fair presentation question, the court below strictly construes *Duncan* and *O'Sullivan* to require that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it," and holds that, by operation of Oregon's unique post-conviction statutes, the State of Oregon was given "a fair opportunity" to pass upon the habeas petitioner's federal constitutional claim?

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BRIEF IN OPPOSITION

Petitioner Baldwin ("the state") seeks a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit. The respondent ("Mr. Reese") opposes the issuance of a writ.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 282 F.3d 1184 (2002) and is attached to the Petition for Writ of Certiorari as Appendix A. The district court's opinion is not reported. It is attached to the Petition as Appendix B. The Findings and Recommendation, and the Amended Findings and Recommendation, of the Magistrate Judge appear in the state's Supplemental Appendix.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1). The state's petition was timely filed.

STATUTES AND OTHER PROVISIONS INVOLVED

Or. Rev. Stat. § 138.640 (1999) provides, in pertinent part:

> The order making final disposition of the [post-conviction] petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a final judgment for purposes of appellate review and for purposes of res judicata.

Or. Rev. Stat. § 138.660 (1999) provides, in pertinent part:

> In reviewing the [post-conviction] judgment of the circuit court...., the Court of Appeals...may summarily affirm...the judgment on appeal.... A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal.

Or. R. App. P. 9.20 provides, in pertinent part:

> (2) If the Supreme Court allows the petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

STATEMENT OF THE CASE

I. CONVICTION AND DIRECT APPEALS

In 1991, following a bench trial, Mr. Reese was convicted on two counts of first-degree kidnapping and one count of first-degree attempted sodomy. He was sentenced to a thirty-year determinate sentence as a dangerous offender on each kidnapping count, to be served concurrently with each other. He was also sentenced to a thirty-six-month sentence for attempted sodomy, to be served consecutively to the kidnapping sentences.

Mr. Reese appealed. In *State v. Reese*, 114 Or. App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for resentencing. The Court of Appeals held that the trial court should have indicated a

presumptive sentence, such that the entire thirty-year sentence would not necessarily have to be served because, once the presumptive sentence was served, Mr. Reese would become eligible for consideration for release to post-prison supervision. *Id.* at 560.

Mr. Reese was resentenced on March 4, 1993. Represented by the same attorney who had represented him at trial and at the first sentencing, he was resentenced to thirty years imprisonment as a dangerous offender on the kidnapping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Mr. Reese again appealed. In *State v. Reese*, 128 Or. App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for resentencing. It held that the "trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence," and it "failed to do so." *Id.* at 326.

Mr. Reese was resentenced on September 9, 1994. A different attorney was appointed to represent him at this proceeding. Mr. Reese objected to this new attorney and ultimately appeared *pro se* before the court. In this proceeding, the prosecutor dropped his request to sentence Mr. Reese as a dangerous offender. The court sentenced Mr. Reese to a guidelines departure sentence of 260 months on each of the kidnapping convictions, to be served concurrently with each other, along with a thirty-six-month consecutive sentence for the attempted sodomy conviction.

Mr. Reese appealed the second resentencing. His appointed appellate attorney filed a *Balfour* brief. A *Balfour* brief is the Oregon variant of an *Anders* brief.[1] A *Balfour* brief is filed when an appointed lawyer believes there are no issues of merit. Counsel prepares and signs a statement of facts and procedural history as Part A. Counsel then includes any issues that the appellant wishes to raise as Part B. This section is signed by the appellant.

Unlike the system described in *Anders*, the *Balfour* system does not require counsel to withdraw. Also unlike *Anders*, an Oregon appellate court presented with a *Balfour* brief does not engage in its own independent review of the entire record. *See State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991).

The Oregon Court of Appeals affirmed without opinion. *State v. Reese*, 134 Or. App. 629, 894 P.2d 1268 (1995). Mr. Reese's counsel did not seek review by the Oregon Supreme Court.

II. POST-CONVICTION REVIEW

Mr. Reese then filed a petition for post-conviction relief ("PCR"). The PCR trial court appointed new counsel for Mr. Reese. Counsel then filed an amended PCR petition raising the claim of ineffective assistance of appellate counsel, citing explicitly

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[1] *Anders v. California*, 386 U.S. 738 (1967).

to the Sixth and Fourteenth Amendments of the United States Constitution as well as to the Oregon Constitution.[2]

The PCR court denied the ineffective assistance of appellate counsel claim, citing only federal authority. In its Memorandum of Opinion, beneath the heading titled "Adequate Appellate Counsel," the court simply wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983)."[3]

Mr. Reese appealed. He was appointed still another counsel for the PCR appeal in the Oregon Court of Appeals. Mr. Reese's PCR appellate counsel filed a *Balfour* brief, just as Mr. Reese's direct appeal counsel had done. For the section of the brief presenting the claims counsel thought without merit, counsel inexplicably attached Mr. Reese's *pro se* PCR petition rather than the amended petition that had been prepared by an attorney. As a result, the *Balfour* brief did not explicitly cite to federal

---

[2]Although Mr. Reese's *pro se* PCR petition also alleged ineffective assistance of appellate counsel, it did not refer to the Sixth and Fourteenth Amendments.

[3]Just above the court's decision on the appellate counsel claim was a separate heading entitled "Adequate Assistance of Counsel." Under that heading, the PCR court ruled, "Petitioner received adequate assistance of trial counsel," citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), the leading federal precedent establishing the standard for ineffective assistance of counsel under the Sixth Amendment, and also citing "*Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981)," an Oregon case analyzing ineffective assistance claims under both the federal and Oregon Constitutions. *See Krummacher*, 290 Or. 867, 627 P.2d at 458, 461.

authority for the ineffective assistance of appellate counsel claim, as the amended petition had done.

The state filed a motion for summary affirmance. The Oregon Court of Appeals granted the motion and summarily affirmed the PCR court's decision without a written opinion.

Mr. Reese then filed a petition for review in the Oregon Supreme Court. He again alleged ineffective assistance of appellate counsel:

> **Statement of reasons for reversal of Court of Appeals**
>
> The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.
>
> **Statement of Facts**
>
> ...Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

App. A at 7-8 n. 5.

The petition also raised the issue of ineffective assistance of trial counsel. It cited to the Sixth and Fourteenth Amendments of the United States Constitution in support, as follows:

> Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th, and 14th Amendment rights have been violated.

Id. at 8 n. 5.

The Oregon Supreme Court denied review.

III. FEDERAL HABEAS CORPUS

Mr. Reese again alleged his appellate counsel rendered ineffective assistance in his amended habeas corpus petition. The case was referred to a Magistrate Judge, who ruled Mr. Reese fairly presented his claim of ineffective assistance of appellate counsel and recommended granting relief on that claim.

The Magistrate Judge ruled that the Oregon *Balfour* system is unconstitutional. This Court then decided *Smith v. Robbins*, 528 U.S. 259 (2000). In response, the state moved the Magistrate Judge to reconsider her ruling. The Magistrate Judge reviewed further briefing from the parties and again ruled that the *Balfour* system is unconstitutional.

The state objected to the Findings and Recommendation of the Magistrate Judge. It challenged the Magistrate Judge's conclusions that the *Balfour* system is unconstitutional and that Mr. Reese had fairly presented his claim of ineffective assistance of appellate counsel to the Oregon Court of Appeals. The district court initially agreed with the Magistrate Judge, but ultimately overturned the Magistrate Judge's Recommendation due to the intervening November 13, 2000, decision of the

Ninth Circuit Court of Appeals in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). Mr. Reese moved unsuccessfully for reconsideration and then appealed to the Ninth Circuit Court of Appeals.

IV. THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit reversed the district court's decision. In a section entitled, "Scope of *Lyons*," it reaffirmed that *Lyons*'s "requirement of explicitly presenting a federal claim must be satisfied at the highest levels of the state court system to ensure that possibilities of the state courts resolving federal issues relating to state prisoners have been truly exhausted." App. A at 12. The court also acknowledged the dictates of *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999):

> To exhaust a claim in the state courts, a habeas petitioner must, in addition to complying with *Lyons*, present that claim to the state's highest court, even if that court has discretionary control over its docket.

Id. (citing *O'Sullivan*, 526 U.S. at 845).

The Ninth Circuit strictly construed *O'Sullivan*. It held:

> A request to a lower court alone is not sufficient to exhaust prospects of state court relief on a federal claim. To exhaust requires that the highest state court must be alerted to the specifically federal nature of the claim presented.

Id. The court explained the interplay between *O'Sullivan* and *Lyons*, holding "that a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it." *Id.*

The court, applying relevant Oregon law, then determined that the Oregon Court of Appeals had been fairly presented with Mr. Reese's federal ineffectiveness of appellate counsel claim. App. A at 14-15; *see* Or. Rev. Stat. §138.640 (1999); Or. R. App. P. 9.20(2). Citing this Court's decision in *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995), the court determined that Mr. Reese fairly presented the issue to the Court of Appeals:

> To summarize our views: Reese raised the ineffective assistance of appellate counsel claim and cited federal authority in his petition to the PCR court. The PCR court cited only federal law in deciding the issue, and under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United State Constitution." *Duncan*, 513 U.S. at 365-66, 115 S. Ct. 887.

Id. at 15.

The court then addressed the issue of fair presentation to the Oregon Supreme Court. App. A at 16-19. Once again adhering to the dictates of *Duncan*, the court held that Mr. Reese met its fair presentation requirement because the Oregon Supreme Court had a fair opportunity to pass on his claims. The court held:

> The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the state "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis in internal quotations omitted). *See also Lyons*, 232 F.3d at 668 ("to satisfy the exhaustion requirement of §2254, habeas petitioners must 'fairly presen[t]

> federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights.'"(quoting *Duncan*, 513 U.S. at 365, 115 S. Ct. 887)). Comity requires only that we do not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.

Id. at 18 (emphasis by court).

REASONS FOR DENYING THE PETITION

There are six reasons for denying the state's petition:

- The decision of the court below rests on its interpretation of Oregon appellate procedure rather than on a failure to adhere to this court's fair presentation requirement.
- The state mischaracterizes the Ninth Circuit's decision of the fair presentation issue. In this and all of its fair presentation decisions, the Ninth Circuit has strictly adhered to the requirements of *Duncan v. Henry* and *O'Sullivan v. Boerckel*.
- The Ninth Circuit's strict adherence to the fair presentation requirements of *Duncan* and *O'Sullivan* runs counter to granting certiorari review to correct any conflict among the circuits.
- There are other legal grounds for affirmance that demonstrate the decision below is correct regardless of how the Court resolves the question presented.

- The question presented was never raised in the district court and was therefore waived by the state.
- The court below honored the principles of comity and federalism in correctly deciding this case on the merits.

Federal habeas corpus law is based on respect for comity. *Cf. Coleman v. Thompson*, 501 U.S. 722 (1991). Accordingly, respect is due to state procedures governing the means by which the state's appellate courts consider post-conviction claims to have been presented to them.

The fair presentation requirements of *Duncan* and *O'Sullivan* stem from this respect for comity.

> The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §2254(b) and (c), reflects a policy of federal-state comity, "an accommodation of our federal system designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights."

Picard v. Connor, 404 U.S. 270, 275 (1971). In *O'Sullivan*, 526 U.S. at 848-49, this Court held that "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process."

The Ninth Circuit Court of Appeals held that the State of Oregon had been presented with one full opportunity in Mr. Reese's case. The Ninth Circuit showed the utmost respect for comity. The Ninth Circuit has consistently done so in all of its decisions applying the fair presentation requirements developed by this Court in *Duncan* and *O'Sullivan*.

Nevertheless, Oregon urges this Court to adopt a uniform federal standard in this case, a standard requiring an identical form of presentation in every state, even states like Oregon, whose courts, pursuant to rules of pleading and decision, consider the petitioner's federal claims adequately raised. Oregon's argument is against comity, because it fails to afford full respect for the states' decisions about how to structure their own rules of pleading and decision.[4] It would result in a trap for the unwary, because PCR petitioners could plead facts and law sufficient to raise a federal claim in the view of the state courts, only later to find that a federal court would hold that the state court was nof given an adequate opportunity.

---

[4]Under *O'Sullivan*, 526 U.S. at 848-49, "state prisoners must give the state courts one full opportunity to resolve constitutional issues by *invoking one complete round of the state's established appellate review practice*" (emphasis added). In determining whether the opportunity requirement, and hence comity, has been fulfilled, the federal courts must refer to the individual "appellate review practices" of each state.

I. THE DECISION OF THE COURT BELOW RESTS ON ITS INTERPRETATION OF OREGON APPELLATE PROCEDURE RATHER THAN ON A FAILURE TO ADHERE TO THIS COURT'S FAIR PRESENTATION REQUIREMENT.

A. *The State Contended, in Its Rehearing Petition, That the Decision of the Court Below Rested on a Misunderstanding of State Appellate Procedure.*

The state devoted an entire section of its Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* to the contention reflected in its section heading, that "The Panel Decision Rests on the Misunderstanding of State Appellate Procedure."[5] The state argued, *inter alia*, that "the panel misunderstood a petitioner's role in the *Balfour* process, misapprehended Oregon's summary affirmance process, and failed to understand that appellate courts in Oregon cannot and do not consider claims not presented to them." App. 1 at 1.

The panel decision was based on a correct understanding of Oregon appellate procedure. However, whether the panel's application of Oregon appellate procedure was correct is beside the point. This Court should deny review, because the Court's interpretation of Oregon appellate procedure will only involve matters of Oregon law.

B. *In Its Petition for Writ of Certiorari, the State Fails to Disclose Key Features of Oregon Appellate Procedure Which Ensured That the Oregon Appellate Courts Were Presented with Mr. Reese's Federal Constitutional Issue.*

The court below recognized the unique statutory structure in Oregon which ensured that the Oregon appellate courts reviewed Mr. Reese's ineffective assistance of

[5]Section F of the state's rehearing petition is attached as Appendix 1.

appellate counsel claim as a federal constitutional claim. The court quoted the relevant statute, as follows:

> Oregon law requires the PCR court to "state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. §138.640 (1999).

App. A at 14.

Other language from the Oregon PCR statute is also relevant. The statute provides that the order, which must state clearly the grounds upon which the cause was determined, "shall constitute a final judgment for purposes of appellate review...." *Id.* This is important because the summary affirmance of a judgment, which occurred in Mr. Reese's case, is the summary affirmance of the PCR trial court's memorandum opinion.

The state's petition for writ of certiorari never mentions this provision of Oregon's PCR statutory scheme. The omission erroneously suggests that the Court of Appeals summarily affirmed the PCR court's judgment, without the benefit of its opinion. The state's suggestion is incorrect, however, not only because §138.640 says the PCR court's statement of the grounds for its decision shall constitute the judgment for purposes of appellate review, but also because the separate judgment of the PCR court specifically incorporated its memorandum of opinion. The Judgment stated:

> NOW, THEREFORE, IT IS HEREBY ADJUDGED that based on the Court's Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

Moreover, the state omits any reference to the Oregon statute which provides that a summary affirmance is a judgment on the merits. Or. Rev. Stat. §138.660. Thus, when the state claims that the Court of Appeals summarily affirmed the PCR trial court's judgment, it omits an important piece of Oregon law. Petition at 4. The state ignores the fact that the Oregon Court of Appeals affirmed the PCR court's memorandum opinion, which specifically addressed the federal constitutional issue.

The state also fails to disclose that the ruling by the Court of Appeals was a ruling on the merits. Section 138.660 specifically provides that "[a] dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal."

The state also omits from its certiorari petition the fact that the Oregon Court of Appeals had a duty to examine PCR constitutional determinations anew on appeal. This duty complements the PCR trial court's duty under Or. Rev. Stat. §138.640 to "state clearly the grounds upon which the cause was determined, and whether a state or federal question or both, was presented and decided." Consistent with §138.640, the Oregon Court of Appeals, in its own words, "examine[s] anew the [PCR] court's constitutional determinations." *Davis v. Armenakis*, 151 Or. App. 66, 70, 948 P.2d 327, 329 (1997).

Exposure of these omissions undermines the state's main criticism of the decision of the court below. This criticism contends:

> What the Ninth Circuit has done is to reject the requirement that state appellate courts be provided with an opportunity to consider a federal claim before it can be raised in federal habeas, and instead to require only that state courts have some ability to find the federal claim for themselves in the first instance.

Petition at 26-27.

The Ninth Circuit Court of Appeals did no such thing. Rather, it emphasized the requirement that state courts first be given the opportunity to hear federal habeas claims. App. A at 18-19. The Oregon PCR statutes required the PCR trial court to explicitly identify the grounds upon which it decided the case and to distinguish between the federal and state questions decided. Here, the PCR trial court did so. It clearly articulated its federal basis for deciding the ineffective assistance of appellate counsel claim against Mr. Reese in its memorandum opinion. That specific memorandum opinion was referenced in the judgment, and it was that very opinion and judgment which was affirmed by the Court of Appeals, an affirmance that constituted a ruling on the merits of the very same federal constitutional claim. Any contrary assertion belies the record and the Oregon PCR statutes.

II. THE STATE MISCHARACTERIZES THE NINTH CIRCUIT'S DECISION OF THE FAIR PRESENTATION ISSUE. IN THIS AND ALL OF ITS FAIR PRESENTATION DECISIONS, THE NINTH CIRCUIT HAS STRICTLY ADHERED TO THE REQUIREMENTS OF *DUNCAN v. HENRY* AND *O'SULLIVAN v. BOERCKEL*.

A. Since This Court's Decision in Duncan v. Henry, a Ninth Circuit Case, the Ninth Circuit Has Strictly Adhered to the Requirements of Duncan.

Duncan teaches that the fair presentation requirement earlier outlined by this Court in *Picard*, 404 U.S. at 275, means that state prisoners seeking vindication of federal rights in federal court must first have "alerted [state courts] to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-366. Henry, the petitioner below in *Duncan*, alleged in his habeas petition that he had been denied federal due process due to certain testimony at his state trial. On direct appeal, however, Henry had only complained of a "miscarriage of justice" under the California Constitution. The District Court granted the writ, finding that Henry had exhausted his state remedies, and the Ninth Circuit affirmed. *Id.* at 364-365; *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994). This Court reversed because Henry did not fairly present his due process claim to the California courts as required by *Picard* and by *Anderson v. Harless*, 459 U.S. 4 (1982). *Duncan*, 513 U.S. at 366.

Since this Court reversed the Ninth Circuit's judgment in *Duncan*, the Ninth Circuit has taken pains to comply with this Court's mandate. Following *Duncan*, the Ninth Circuit has made clear that fair presentation is not satisfied by the use of

conclusory words, even if those words are "due process." *See Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999) ("Neither is the exhaustion requirement satisfied by the mere circumstance that the 'due process ramifications' of an argument might be 'self-evident.'" (quoting *Anderson*, 459 U.S. at 7)); *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir.2000) ("Shumway's naked reference to 'due process' in Issue I was insufficient to state a federal claim"); *Lyons*, 232 F.3d 666; *Tamalini v. Stewart*, 249 F.3d 895 (9th Cir. 2001); *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir. 2003) (en banc). As the Ninth Circuit summarizes its post-*Duncan* jurisprudence,

> To "fairly present" his federal claim to the state courts, [the petitioner] had to alert the state courts to the fact that he was asserting a claim under the United States Constitution. *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). The mere similarity between a claim of state and federal error is insufficient to establish exhaustion. *See id.* at 366, 115 S.Ct. 887. Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion. *See Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996).

Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (per curiam).

Plainly and simply, the Ninth Circuit enforces *Duncan*'s fair presentation requirement in every case it hears.

B. Since O'Sullivan v. Boerckel, the Ninth Circuit Has Strictly Adhered to the Requirements of O'Sullivan.

In *O'Sullivan*, this Court detailed a requirement of fair presentation distinct from, but complementary to, that which it had reinforced in *Duncan*. *O'Sullivan* requires state

prisoners who petition for habeas corpus relief to present their federal claims not only to their states' courts but specifically to their states' highest courts in order properly to exhaust those claims. *O'Sullivan*, 526 U.S. at 845. *O'Sullivan's* requirement is not discretionary, even in states whose highest courts have discretionary control over their dockets. *Id.* at 845-848. In *O'Sullivan*, Boerckel, the petitioner below, had failed to present three of the six issues in his federal habeas petition to the Illinois Supreme Court. This Court, overruling the Seventh Circuit, held the District Court had correctly deemed those three issues procedurally defaulted. *Id.* at 841-842, 848.

The state is incorrect when it depicts a Ninth Circuit that applies a "whole record review" test, because the Ninth Circuit's application of *O'Sullivan* is every bit as strict as is its application of Duncan. In *Gatlin*, the Ninth Circuit held the petitioner's due process claim to be procedurally defaulted merely because Gatlin filed a legally insufficient petition for review with the California Supreme Court. 189 F.3d at 888. That is not whole record review. Similarly, the court upheld the state's claim of procedural default in *Hiivala* based on the contents of Hiivala's argument to the Washington Supreme Court. 195 F.3d at 1107; *see also Shumway*, 223 F.3d at 988.

Perhaps the state is confusing "whole record review" with the fact that the Ninth Circuit will not find the fair presentation requirement has been met unless the federal issue is not only presented to the Oregon Supreme Court but also meets Or. R. App. P. 9.20(2)'s requirement to first raise the issue in the Oregon Court of Appeals. Supp.

App. at 34. Thus, Oregon cases get no special treatment from the Ninth Circuit when it comes to the *O'Sullivan* test, because Oregon petitioners must meet the additional requirement of Or. R. App. P. 9.20(2). *See also, Peterson*, 319 F.3d at 1154 (concluding that "Peterson did not fairly present his federal claim to the Oregon Supreme Court because, on the face of his petition for review in that court, he expressly limited his claim to Oregon constitutional law"). The requirements of *O'Sullivan* are safe in the Ninth Circuit.

C. *In Mr. Reese's Case, the Ninth Circuit Strictly Adhered to the Requirements of Duncan and O'Sullivan.*

Consistently with this Court's fair presentation principles, the Ninth Circuit recognizes that Oregon's state appellate rules increase the number of means by which post-conviction petitioners may properly present federal claims to the Oregon Supreme Court. The Ninth Circuit's decision in Mr. Reese's case exemplifies the way in which the Ninth Circuit balances this recognition with its adherence to this Court's standards for fair presentation as explained in *Duncan* and *O'Sullivan*. In Mr. Reese's case, the Ninth Circuit explained that, under those cases, "the issue becomes whether Reese alerted the Oregon Supreme Court to the federal nature of his claim of ineffective assistance of appellate counsel. Because of Oregon's rules of appellate procedure, to resolve this issue we must address two distinct questions: (1) Was the federal nature of Reese's claim

properly raised to the Oregon Court of Appeals; and (2) Did Reese also comply with *Lyons* [which is to say, with *O'Sullivan*] at the Oregon Supreme Court." App. A at 13.

The Ninth Circuit complied with *Duncan* and *O'Sullivan* by ascertaining that Mr. Reese had alerted all three levels of the Oregon court system, including Oregon's highest court, of the fact he was raising his ineffective assistance of appellate counsel claim under the Sixth and Fourteenth Amendments. The Ninth Circuit noted that Mr. Reese had cited federal authority in his amended PCR petition and that the PCR trial court had, in turn, relied exclusively on federal law in denying his claim. App. A at 14. The Ninth Circuit continued by explaining that

> under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66.

Reese, App. A at 15.

Finally, the Ninth Circuit ascertained that its reversal of the District Court would in no way offend the rule of *O'Sullivan* nor its own decision in *Lyons*. This was the case because, in the Ninth Circuit's words,

> the PCR court decided the claim on the basis of federal law; Oregon's procedural rules put the reviewing courts on notice that the PCR court decision was required to state clearly its ground for decision; any review of the PCR court decision would have disclosed its federal law basis; and the Oregon Court of Appeals issued only a summary affirmance of the

> PCR court's decision. Under these circumstances, it must be presumed that, before deciding to deny discretionary review, the Oregon Supreme Court reviewed the PCR court decision that should have alerted the court to the federal nature of Reese's claim.
>
> The Oregon Supreme Court was thus on notice of the specifically federal nature of Reese's claim of ineffective assistance of appellate counsel.

App. A at 19. Compliance with *Duncan* and *O'Sullivan* was a concern of the first order for the Ninth Circuit in deciding Mr. Reese's case.

D. Since Reese, the En Banc Ninth Circuit Has Reaffirmed Its Strict Adherence to Both Duncan and O'Sullivan.

Just this February, the Ninth Circuit, sitting en banc, again made its strict enforcement of *Duncan* and *O'Sullivan* explicit in *Peterson v. Lampert*. In *Peterson*, the District Court held that Peterson, an Oregon prisoner, failed to exhaust his ineffective assistance of counsel claim by expressly limiting his petition for review in the Oregon Supreme Court to a claim that his rights under the Oregon Constitution were violated. *Peterson v. Lampert*, 2000 WL 1268840 (D. Or. Sep. 5, 2000). Peterson appealed to the Ninth Circuit, which affirmed the District Court's decision, 277 F.3d 1073 (2002), and then reaffirmed it en banc, 319 F.3d 1153.

Peterson argued, *inter alia*, that he had fairly presented his federal ineffective assistance claim to the Oregon Supreme Court. He contended this was so because he had presented that claim to the Oregon Court of Appeals, and because Oregon Rule of

Appellate Procedure 9.20(2) states that if the Supreme Court does not limit its consideration to a specific question or questions,

> the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

Or. R. App. P. 9.20; *see Peterson*, 319 F.3d at 1156-1157.

The Ninth Circuit disagreed. It explained that Peterson's petition for review by the Oregon Supreme Court "did not refer to his appellate court brief, did not mention any provision of the Federal Constitution, and did not mention 'ineffective' assistance of counsel." Hence Oregon Rule 9.20 was of no aid to Peterson. *Id.* at 1157. The Ninth Circuit took pains to distinguish Mr. Reese's case, which had recently been before it. It explained that in Mr. Reese's case, Rule 9.20 had quite a different effect, because there "the petition for review explicitly mentioned the federal Sixth and Fourteenth Amendments, and the only opinion below had explicitly decided the ineffective assistance of appellate counsel claim." *Id.*

Since Peterson had not done what Mr. Reese did, the Ninth Circuit explained that the federal courts were closed to him. The Ninth Circuit squarely rested its denial of the writ to Peterson upon the authority of *Duncan* and *O'Sullivan*. *Id.* at 1155-1156, 1161. Its record of compliance with those decisions remains unbroken.

III. THE NINTH CIRCUIT'S STRICT ADHERENCE TO THE FAIR PRESENTATION REQUIREMENTS OF *DUNCAN* AND *O'SULLIVAN* RUNS COUNTER TO GRANTING CERTIORARI REVIEW TO CORRECT ANY CONFLICT AMONG THE CIRCUITS.

Any conflict among the circuits should be settled in a case where the circuit court of appeals does not adhere to the fair presentation requirements of *Duncan* and *O'Sullivan*. This is not that case.

A. *Although the Ninth Circuit Strictly Adheres to the Requirements of Duncan and O'Sullivan, Some Other Circuits Do Not.*

The state is correct when it says that some circuits do not follow *Duncan* and *O'Sullivan* as strictly as others do. The state is incorrect about the relative position of the Ninth Circuit among these circuits, however. The Ninth Circuit is one of the *strictest* circuits, from the standpoint of a petitioner, in this area of the law. *See Peterson*, 319 F.3d 1153; *Lyons*, 232 F.3d 666. It shares pride of place on that ground with the Fourth and Eleventh Circuits. *See Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000); *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002).

The state accurately describes the tests used by the Fourth and Eleventh Circuits. These circuits, like the Ninth, apply a "strict presentation" test. The Fourth Circuit, e.g., explains that

> [f]air presentation mandates that the federal claim "be presented face-up and squarely.... Oblique references which hint that a theory may be lurking in the woodwork will not suffice." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (internal quotation marks omitted). Rather, "both the operative facts and the controlling legal principles must be presented

> to the state court." *Id.* (internal quotation marks omitted). Importantly, the presentation to the state court of a state law claim that is similar to a federal claim does not exhaust the federal claim. *See Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam).

Baker, 220 F.3d at 289; accord, *Isaacs*, 300 F.3d at 1254.

Where the state goes amiss is in its attempt to distinguish the Ninth Circuit's approach. The Ninth Circuit knows every bit as well as the Fourth Circuit how to deal a petitioner's hopes a blow by application of the *Duncan* standard. *Compare Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) (delineating the *Duncan* standard by stating that "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court") *with Baker*, 220 F.3d at 289 ("the presentation to the state court of a state law claim that is similar to a federal claim does not exhaust the federal claim"). The Ninth Circuit's application of *O'Sullivan* is every bit as strict as is its application of *Duncan*. *See Gatlin*, 189 F.3d at 888; *Hiivala*, 195 F.3d at 1107; *Shumway*, 223 F.3d at 988; *Peterson*, 319 F.3d at 1154.

The Ninth Circuit, in sum, does not apply a "whole record review" test, not even in Oregon cases. Only the First and Fifth Circuits apply that sort of test. *See Barresi v. Maloney*, 296 F.3d 48, 52 (1st Cir. 2002); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (per curiam).

The state's description of the "substance of a claim" test applied by the Second, Third, Seventh, and Eighth Circuits accurately reflects the test that is regularly employed by those circuits. *See Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc); *Ramirez v. Attorney General*, 280 F.3d 87, 90, 94-95 (2d Cir. 2001); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Odem v. Hopkins*, 192 F.3d 772 (8th Cir. 1999).

Finally, though the state perplexingly fails to discuss their tests, the remaining circuits are also basically "substance of a claim" circuits. *See Carter v. Bell*, 218 F.3d 581, 606-607 (6th Cir. 2000); *McMeans v. Brigano*, 228 F.3d 674, 681-682 (6th Cir. 2000); *Nichols v. Sullivan*, 867 F.2d 1250, 1252-1253 (10th Cir. 1989); *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997); *Thomas v. Gibson*, 218 F.3d 1213, 1221 n. 6 (10th Cir. 2000). These circuits, for instance, reach a different conclusion than did the Ninth Circuit in *Peterson* on the question of the propriety of citing state-court decisions applying or embodying federal constitutional principles as a method of fair presentation. These circuits allow such citation when a strict-presentation circuit such as the Ninth Circuit would forbid it. *See e.g. McMeans*, 228 F.3d at 681-682.

A comparison of contemporaneous decisions from all the circuits shows that the Ninth Circuit, along with the Fourth and Eleventh Circuits, adheres more strictly —- not, as the state would have it, less strictly — to this Court's fair-presentation cases than do all of the other circuit courts of appeals.

B. If the Court Believes the Conflict Between the Circuits Is Sufficient to Require Correction, It Should Deny the State's Petition in this Case and Consider Granting a Petition in a Case from One of the Circuits That Does Not Strictly Adhere to the Requirements of Duncan and O'Sullivan.

The crux of the amicus brief is that this Court should strictly interpret *Duncan* and *O'Sullivan*. Amicus Brief at 3. However, the amici fail to recognize that the Ninth Circuit strictly interpreted *Duncan* and *O'Sullivan* in Mr. Reese's case, as it has in all other exhaustion cases since this Court's decision in *Duncan*. Therefore, if the amici wish this Court to strictly interpret *Duncan* and *O'Sullivan* in all the circuits, they should file another amicus brief in a case where one of those circuits fails to adhere to the dictates of *Duncan* and *O'Sullivan*.

IV. THERE ARE OTHER LEGAL GROUNDS FOR AFFIRMANCE THAT DEMONSTRATE THE DECISION BELOW IS CORRECT REGARDLESS OF HOW THE COURT RESOLVES THE QUESTION PRESENTED.

In Oregon, appellate counsel may file a *Balfour* brief for an appeal that counsel considers to be without merit. Although both the Magistrate Judge and the District Court Judge found the *Balfour* procedure to be unconstitutional, the court below indicated "we do not have the occasion to rule on the constitutionality of the *Balfour* system." App. A at 8 n. 6.

It was unnecessary for the court below to decide *Balfour*'s constitutionality, because that court ruled that Mr. Reese fairly presented his federal ineffective assistance of counsel claim to the Oregon courts. Should this Court re-open the question of

exhaustion, it will be required to re-open the question of *Balfour*'s constitutionality, because the unconstitutionality of *Balfour*, recognized by both the Magistrate Judge and the District Court Judge, also is the foundation for Mr. Reese's alternative arguments, all of which were articulated in his appeal but were not ruled upon by the court below. That is, the Court will be required to not only decide the constitutionality of the *Balfour* system, but it will be required, in turn, to decide or to remand for a decision on whether: (1) the *Balfour* procedure rendered Oregon's post-conviction process ineffective to protect the rights of Mr. Reese, thereby excusing exhaustion altogether; (2) the *Balfour* system constitutes an adequate state ground to support a procedural default in this case; and (3) there is cause and prejudice in Mr. Reese's case.

The dissenting opinion below recognizes Mr. Reese did not receive a fair shake:

> By dissenting, I do not mean to diminish the disturbing history of this case. The parade of lawyers assigned to Reese and the mistakes made in his representation are an embarrassment.

App. A at 23. However, the dissent fails to mention that the embarrassment stemmed from Oregon's unconstitutional *Balfour* system -- a system which permitted Mr. Reese's direct appeal counsel to refuse to argue issues on his behalf, and which, in turn, allowed PCR appellate counsel to do the same -- in both instances without requiring an *Anders*-type brief by counsel or independent review of the record by the Court of Appeals.[6]

---

[6]Mr. Reese was resentenced without counsel and without waiving his right to counsel under *Faretta v. California*, 422 U.S. 866 (1975). His direct appeal counsel did not raise the waiver issue but instead filed a *Balfour* brief. His post-conviction appeal

V. THE QUESTION PRESENTED WAS NEVER RAISED IN THE DISTRICT COURT AND WAS, THEREFORE, WAIVED BY THE STATE.

In her Amended Findings and Recommendation, the Magistrate Judge specifically found that Mr. Reese had presented his federal constitutional issue in his petition for review to the Oregon Supreme Court. Supp. App. at 34. The state objected to the Magistrate Judge's Amended Findings and Recommendation, but it did not contest her specific finding that Mr. Reese had presented his federal constitutional issue to the Oregon Supreme Court in his petition for review. Rather, as it had argued throughout the course of the district court litigation, the state vigorously argued that Mr. Reese's ineffective assistance claim had not been fairly presented to the intermediate appellate court, the Oregon Court of Appeals. *See* State's Objections at 3-5, attached as Appendix 2. By failing to raise a procedural default defense in the district court regarding the petition for review to the Oregon Supreme Court, the state waived it.[7]

The state waives its procedural default defense when it fails to raise it in the district court. See generally Randy Hertz & James S. Liebman, 2 Federal Habeas Corpus Practice & Procedure 4th § 26.2a, at 1142-1148 & nn. 1-6, Supp. at 109-110 (2001 & Supp. 2002) (collecting cases).

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counsel turned in a similarly slipshod performance, filing another *Balfour* brief rather than arguing that direct appeal counsel was ineffective for failing to raise the issue.

[7]Mr. Reese presented this waiver argument in the court below, but the court did not address it.

In *Trest v. Cain*, this Court observed that:

> procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.' *Gray v. Netherland*, 518 U.S. 152, 166, 116 S. Ct. 2074, 2082, 135 L.Ed.2d 457 (1996); *see Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1, 100 S. Ct. 2124, 2127, n. 1, 65 L.Ed.2d 86 (1980).

522 U.S. 87, 89 (1997). The Court made the same point, albeit in dicta, nearly two decades earlier:

> In some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim. E.g., *Estelle v. Smith*, 451 U.S. 454, 468, n. 12, 101 S. Ct. 1866, 1876 n. 12, 68 L.Ed.2d 359 (1981); *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1, 100 S. Ct. 2124, 2127 n. 1, 65 L.Ed.2d 86 (1980).

Engle v. Isaac, 456 U.S. 107, 124 n. 26 (1982). *See also Lee v. Kemna*, 534 U.S. 362, 376 n. 8 (2002) (different procedural posture).

Because the state never argued in the district court that a procedural default occurred based on Mr. Reese's purported failure to properly present the appellate ineffective assistance claim in his petition for review to the Oregon Supreme Court, it waived the defense.

VI. THE COURT BELOW HONORED THE PRINCIPLES OF COMITY AND FEDERALISM IN CORRECTLY DECIDING THIS CASE ON THE MERITS.

Mr. Reese agrees with the state that "judges are not like pigs hunting for truffles buried in briefs." Petition at 27 (quoting dissenting opinion below, App. A at 20). In Mr. Reese's case, however, no hunting was required.

The PCR trial court's memorandum opinion did what Or. Rev. Stat. §138.640 requires: it specified the federal constitutional basis of the court's ruling. The PCR court's opinion then became the court's judgment, again pursuant to Or. Rev. Stat. §138.640. The constitutional determination was then "examine[d] anew" by the Oregon Court of Appeals. *Davis*, 151 Or. App. at 70, 948 P.2d at 329. Pursuant to Or. Rev. Stat. §138.660, the appellate court's summary affirmance of the judgment constituted a ruling on the merits of the federal ineffective assistance claim. Finally, in his petition for review to the Oregon Supreme Court, Mr. Reese sought further review of his claim of ineffective assistance of appellate counsel, a claim presented and decided as a federal constitutional claim.

The exhaustion principle ensures that state courts have the first opportunity to correct their own constitutional errors. The court below honored this principle, stating:

> The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the state "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis in internal quotations omitted).

App. A at 18. Oregon had a fair opportunity to decide the federal claim. If the Oregon Supreme Court had granted review, the only ineffective assistance of appellate counsel claim it could have decided was the federal claim decided by the PCR court and affirmed on the merits by the Oregon Court of Appeals.

Comity was served here. Mr. Reese gave the state courts a fair opportunity to pass upon and correct his federal constitutional claim, and the Oregon courts forewent their opportunity. Oregon had the first opportunity to hear Mr. Reese's federal habeas claim. The court below, showing respect to comity and federalism, agreed. Quoting *Duncan*, 513 U.S. at 365, for the proposition that "[t]o satisfy the exhaustion requirement of §2254, habeas petitioners must 'fairly presen[t] federal claims to the state courts to give the state the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights," it held that Oregon had such an opportunity, thereby satisfying comity's chief concern:

> Comity requires only that we not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity the state foregoes.

App. A at 18 (emphasis by the court).

Oregon's plea for a uniform fair presentation rule runs counter to comity. It fails to afford full respect for every state's decision about how to structure its own rules of pleading and decision. It also constructs a trap for unwary PCR petitioners, who could plead facts and law sufficient to raise their federal claims in the view of the state courts, only later to find that the federal courts think that the state courts were not given an adequate opportunity.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 21st day of April, 2003.

Dennis N. Balske
Attorney for Respondent

No. 02-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 200__

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

CERTIFICATE OF SERVICE AND MAILING

I, Dennis N. Balske, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION on the counsel for the petitioner by depositing in the United States Post Office, in Portland, Oregon on April 18, 2003, first class postage prepaid, a true, exact and full copy thereof addressed to:

AAG Robert Rocklin &
Mary H. Williams
240 Justice Building
Salem, OR 97310

Walter Dellinger
Acting Solicitor General
Department of Justice,#5614
10th & Constitution, N.W.
Washington, D.C. 20530

Stephen R. Carter
Attorney General of Indiana
Gary Damon Secrest
Deputy Attorney General
Office of the Attorney General
Indiana Government Center South, Fifth Floor
402 West Washington Street
Indianapolis, IN 46204-2770

and by email to AAG Robert Rocklin at bob.rocklin@state.or.us.

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on April 18, 2003, with first-class postage prepaid.

Dennis N. Balske
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this April 18, 2003.

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Supreme Court, U.S.
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No. 02-964

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS *
Solicitor General
JANET A. METCALF
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
(503) 378-4402

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

PETITIONER'S REPLY BRIEF

The question presented in the State's petition for certiorari is whether "a state prisoner 'alert[s]' the State's highest court that he is raising a federal claim when—in that court—he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis[.]" (Petition i). The Ninth Circuit held that Reese "fairly presented" his federal claim of ineffective assistance of appellate counsel to the Oregon Supreme Court because that court had the "opportunity" to discover that Reese was raising a federal claim. (Petition, App-18). Although he did not support his claim of ineffective assistance of appellate counsel made to the state Supreme Court with any citation of federal authority or otherwise make it clear that he was raising a federal claim at all, the Ninth Circuit nevertheless held that the state court could have discerned that a federal claim had been raised by reading the decision of the state post-conviction trial court. (Petition, App-16 to App-19).

In the State's view, the Ninth Circuit thus transformed the "fair presentation" requirement, which demands that a litigant "fairly present" his federal claim to the State's highest court, into one that puts the onus instead on the state court to pursue any "fair opportunity" it may have to uncover a federal claim in the record made below. The State's position is that to "fairly present" a federal claim to a state court a petitioner must either cite the federal constitution or decisions expressly based on federal law, or otherwise make it clear that his claim is based on federal law.

In response to the State's petition, Reese has filed a brief in opposition that struggles mightily to avoid the question presented and to obfuscate the issues raised. None of Reese's "reasons for denying the petition" should prove persuasive.

Reese first contends that the Ninth Circuit's decision rests on its interpretation of State appellate procedure and that

"[t]his Court should deny review, because the [Ninth Circuit's] interpretation of Oregon appellate procedure will only involve matters of Oregon law." (Brief in Opposition 13). Reese is incorrect. The answer to the question presented in the State's petition does not depend on any issue of the State's appellate procedure, and those procedures are not relevant to the question presented. The pivotal procedural facts are few and they are clear. Reese raised a federally-based claim of ineffective assistance of appellate counsel before the state post-conviction trial court and that court decided the federal issue. Before the state Supreme Court, however, Reese raised no such claim. He did not cite the federal constitution or any decision based on that constitution. He did not in any fashion make it clear that he was raising a federal claim of ineffective assistance of counsel. That claim could be found only by reviewing the record made below in the state post-conviction proceedings and discovering the federal issue in the post-conviction trial court's decision.[1]

Reese's next two reasons for denying the State's petition depend on his assertion that the Ninth Circuit, "[i]n this and all of its fair presentation decisions, has strictly adhered to the requirements of *Duncan v. Henry* and *O'Sullivan v. Boerckel*." (Brief in Opposition 10).[2] The State admits that the Ninth Circuit's decision in this case pays lip service to this Court's "fair presentation" jurisprudence. Much of the court's description of the applicable law is accurate.

But what the court did, and what it ultimately said, are at odds with this Court's case law. Although the Ninth Circuit recited the applicable legal standards, what it did was to turn the "fair presentation" requirement, where it is the petitioner who must "fairly present" his claims to the state's highest

[1] Or at least that is where the Ninth Circuit believed the state Supreme Court should have found it. (Petition, App-17).

[2] *Duncan v. Henry*, 513 U.S. 364 (1995); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

court, into a "fair opportunity" requirement that is imposed on the state court and that demands that it "hunt[] for truffles buried in" the state court records. (Petition, App-20). The Ninth Circuit concluded that:

> Comity requires only that we not rule if the state court has not had the opportunity first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state forgoes.

(Petition, App-18). The state Supreme Court had that opportunity, the court determined, because it could have read the state post-conviction trial court's decision and because, even if it did not, that would not matter. In that event, "the court [would have] chosen not to take advantage of an opportunity provided [by the existence of the lower court's decision][.]" Therefore, the court concluded that "the interests of comity are no longer at issue." (Petition, App-19).

That approach and the court's analysis cannot be squared with this Court's "fair presentation" case law. And that the lower court accurately described and purported to apply that case law, while ultimately straying far from it, underscores the point made in the State's petition that, for the most part, the circuit courts of appeal have failed "to heed *Duncan*'s admonition that state prisoners wishing to raise federal claims in state court must 'say so.'" (Petition 16).[3]

[3] In arguing that the Ninth Circuit "strictly adheres" to this Court's "fair presentation" decisions, Reese relies heavily on that court's subsequent *en banc* decision in *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir. 2003). (Brief in Opposition 22-26). Of course, that the Ninth Circuit may have gotten one case right hardly demonstrates that this decision is correct. And, although the court's decision in *Peterson* attempts to reconcile that case with this one, 319 F.3d at 1157, in fact the two decisions appear to be at odds with each other. In *Peterson*, the court held that the petitioner was required affirmatively to fairly present his federal claim to the state Supreme Court and that he had failed to do so. But Peterson had expressly relied on the federal constitution in his brief filed

Reese also contends that this Court should not grant the State's petition because "[t]here are other legal grounds for affirmance that demonstrate the decision below is correct regardless of how the Court resolves the question presented." (Brief in Opposition 10). Reese refers to the issue of whether the State's *Balfour* procedure[4]—which is used when appointed appellate counsel determines that there are no non-frivolous issues that can be raised on appeal—is constitutionally adequate. (Brief in Opposition 27-28). That issue would play no role in this Court's review, however. The Ninth Circuit did not decide the issue, concluding that it had no "occasion to rule on the constitutionality of the *Balfour* system" and determining only that Reese had "exhausted his claim of ineffective assistance of appellate counsel." (Petition, App-8 n. 6). Thus, the "fair presentation" issue is the only issue that is before this Court. If this Court were to affirm the Ninth Circuit on that issue, then the proper disposition would be the one reached by that court, that is, a remand for further proceedings on the merits of Reese's claim of ineffective assistance of appellate counsel. (Petition, App-19).

Reese's next reason for denying the State's petition is based on the allegation that the question presented here, and the issue of procedural default, "was never raised in the district court and was, therefore, waived by the state." (Brief in Opposition 29). That assertion is false. In its reply memorandum filed in the district court in response to Reese's

---

with the state Court of Appeals, although he did not do so in his petition filed with the state Supreme Court. 319 F.3d at 1155. If *Reese* is correct, if "fair opportunity" is enough, and if it is sufficient that somewhere in the record the federal constitution was invoked, it is difficult to understand why Peterson was found not to have fairly presented his federal claim. Thus, the two decisions appear to be in conflict, a fact that again advances the State's point that the circuit courts of appeal do not consistently and faithfully apply this Court's "fair presentation" case law.

[4] *State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991).

amended petition and memorandum, the State specifically argued that Reese had procedurally defaulted his ineffective assistance of appellate counsel claims because he had not "fairly presented" them to the state courts, including the state Supreme Court.[5]

CONCLUSION

As the State noted in its petition, "[t]his case presents the Court with the opportunity to provide circuit courts with badly needed clarification of the meaning of 'fairly presented' in federal habeas litigation and, in doing so, to bring consistency to federal circuits' efforts to resolve exhaustion/procedural default questions." (Petition 11). Although Reese strives to blur the issues and attempts to lead the Court away from them, the case squarely presents the question posed in the State's petition. The State respectfully requests that this Court grant the petition and proceed to consider the significant issue presented, which continues to plague and divide the circuit courts.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS *
Solicitor General
JANET A. METCALF
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
(503) 378-4402

May 2, 2003

Counsel for Petitioner

---

[5] An excerpt from the State's memorandum is appended.

APPENDIX

EXCERPT FROM REPLY MEMORANDUM IN RESPONSE TO PETITIONER'S AMENDED PETITION AND MEMORANDUM, AND OBJECTIONS TO PETITIONER'S EXHIBITS

Regarding the first claim of error alleged in his appellate brief, petitioner specifically mentioned that "[t]he trial court erred when it once again viciously disregarded the Court of Appeals' decision and sentenced defendant with prejudice, and *without regard to Oregon law and statutes*." Resp. Ex. 11 at 5 (emphasis added). Regarding the fifth claim of error alleged in his appellate brief, petitioner again relied exclusively on state law to argue that the trial court erroneously imposed a departure sentence based on his then existing criminal history and the seriousness of his offense (Resp. Ex. 11 at 9-10). The Fifth Amendment to the U.S. Constitution was never cited or relied upon to support either of these claims as required by *Duncan* and the doctrine of exhaustion.

Furthermore, whether an Oregon state trial court properly followed directions from the Oregon Court of Appeals is state law issue. Similarly, whether a state court properly imposed a departure sentence under the state sentencing guidelines is also question of state law. Therefore, neither of these claims are cognizable in a federal habeas proceeding because 28 U.S.C. § 2254(a) allows federal courts to entertain applications for writs of habeas corpus by state prisoners "only on the ground that the is in custody in violation of the Constitution or laws or treaties of the United States." *Id. See also Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) ("[i]t is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of [federal] constitutional dimension." 464 U.S. at 83 (*citing Engle v Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)).

Petitioner also argues that if his vindictive sentencing claim is defaulted, the default should be excused due to the ineffective representation rendered by counsel. However, ineffective counsel claims do not establish cause unless they were first properly raised as independent claims in state court, which petitioner again failed to do. *Supra*, section B. 2.

4. Ineffective Assistance of Appellate Counsel Claim is Defaulted

In ground four of his amended petition, petitioner alleges that appellate counsel performed ineffectively by failing to raise two meritorious issues, failing to withdraw, and failing to exhaust petitioner's state remedies by refusing to file a petition for review in the Oregon Supreme Court. Petitioner also argues that these claims are not defaulted because they were litigated in his PCR trial (Pet. Memo. At 21-23). This is incorrect. First, these claims were not properly alleged in petitioner's PCR petition and were therefore not actually litigated. *Supra*, section B. 2, note 6. Regarding this issue, petitioner's PCR petition generally alleged that appellate counsel "failed to raise issues that had been preserved for appeal." Resp. Ex. 114 at 5. In response to this general claim, the state simply argued that "[p]etitioner cannot state what colorable issues appellate counsel failed to raise on appeal that reasonable counsel would have raised and which would have achieved a favorable outcome." Resp. Ex. 116 at 25-26. Neither side litigated what specific claims should have been raised by appellate counsel.

Secondly, even if the Court finds that petitioner's appellate counsel claims were litigated during petitioner's PCR trial, they were nevertheless not "fairly presented" to the Oregon appellate courts. In his PCR appeal, petitioner generally stated that appellate counsel was ineffective for failing to raise issues on appeal (Resp. Ex. 125 at 5). However, petitioner failed to make even a passing reference to the

federal constitution or any other body of federal law. The Oregon appellate courts therefore were not alerted to any federal claims raised by petitioner as required by *Duncan* and the doctrine of exhaustion. *Supra*, section B.2. Moreover, their merits would not be considered. *Supra*, section B.2. Relief on these claims should accordingly be denied.[1]

[1] Unlike the petitioner in *Delgado v. Lewis*, 1999 WL 415523 (9th Cir. June 23, 1999), who specifically alleged ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), petitioner in this case failed to refer to any body of federal law at all to alert the Oregon courts to alleged violations of federal law.

Supreme Court, U.S.
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No. 02-964

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, TEXAS, MONTANA, MAINE, MISSOURI, WEST VIRGINIA, UTAH, VERMONT, SOUTH DAKOTA, MISSISSIPPI, NEBRASKA, WASHINGTON, IDAHO, COLORADO, ALASKA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

STEPHEN R. CARTER
Attorney General Of Indiana
* GARY DAMON SECREST
Deputy Attorney General
Office of the Attorney General
Indiana Government Center South
Fifth Floor
402 West Washington Street
Indianapolis, IN 46204-2770
(317) 232-6315

* *Counsel of Record for Amici Curiae*

(Additional Counsel Listed on Inside Cover)

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

8 pp

GREG ABBOTT
Attorney General of Texas
PO Box 12548
Austin, TX 78711-2548

MIKE MCGRATH
Attorney General of Montana
215 N. Sanders
PO Box 201401
Helena, MT 59620-1401

G. STEVEN ROWE
Maine Department of the
Attorney General
6 State House Station
Augusta, ME 04333

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Bldg.
207 W. High Street
Jefferson City, MO 65101

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, Rm 26-E
Charleston, WV 25305

JON BRUNING
Attorney General of Nebraska
State Capitol
PO Box 98920
Lincoln, NE 68509-8920

GREGG D. RENKES
Attorney General of Alaska
PO Box 110300
Juneau, AK 99801

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

WILLIAM H. SORRELL
Office of the Attorney
General
109 State Street
Montpelier, VT 05602

LARRY LONG
Attorney General of
South Dakota
500 E. Capitol Ave.
Pierre, SD 57501-5070

MIKE MOORE
Attorney General of
Mississippi
PO Box 220
Jackson, MS 39205-0220

LAWRENCE WASDEN
Attorney General of Idaho
Statehouse
Boise, ID 83720-0100

CHRISTINE GREGOIRE
Attorney General of
Washington
1125 Washington Street SE
Olympia, WA 98504-0100

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman Street
7th Floor
Denver, CO 80203

QUESTION PRESENTED

By statute and the Court's caselaw, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting relief through *habeas corpus* proceedings. The Court has held that exhaustion requires a state prisoner to "fairly present" his claim to a state's highest court, and that fair presentment requires the prisoner to alert the state court that the claim is federal in nature and substance.

Does a state prisoner "alert" a state's highest tribunal that he is raising a federal claim when he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis?

INTEREST OF AMICI

All states devote considerable resources to defending federal *habeas corpus* actions.[1] These precious resources are diminishing while the *habeas* caseload is increasing. The *amici* jurisdictions embrace and encourage efforts to simplify and expedite the process in ways that will permit the states to deploy their limited resources efficiently and avoid expensive and wasteful briefing.

The petition in this case represents such an effort which the *amici* states endorse. The issue presented is the definiteness and clarity with which a state prisoner must identify his federal claims in state court before raising them in a *habeas* action.

A majority of the federal circuits require only a minimal level of clarity, resulting in analyses that are cumbersome and expensive to apply. Oregon's petition asks the Court, consistent with its recent precedent, to reject those methodologies in favor of one that requires a greater degree of specificity and definiteness. Oregon's analysis inquires only whether state prisoners have explicitly identified their federal claims in their pleadings before the state's highest court. This regime is straightforward and simple to apply, and imposes no undue burden upon *habeas* petitioners.

The frequency with which the question is litigated makes it essential to adopt a uniform exhaustion requirement and analysis that is easy to apply. Over half of federal *habeas* proceedings are eventually dismissed on exhaustion grounds. 6 Wayne R. LaFave *et al.*, *Criminal Procedure* § 28.5(a) (2d ed.) (2003 Pocket Part) (citing a 1995 Department of Justice study). This figure does not account for all cases in which the

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[1] This brief is submitted by the Attorneys General of the amici states pursuant to Rule 37.4.

exhaustion question is litigated and the states' dismissal motions are denied.

Adoption of Oregon's position, by compelling the prior litigation of federal claims in state court, will benefit the federal district courts as well by ensuring they have a competent state court decision on the federal issues to review. Such a regime will also ensure that the greater part of the states' resources will be expended in their own courts, rather than for the first time in the federal system.

Amici states do not seek to strip state prisoners of their right to federal review. *Amici* do seek to minimize the time they must spend addressing procedural issues surrounding *habeas* claims, issues which are unrelated to whether a prisoner's constitutional rights have been violated. In addition, *amici* seek a consistent and realistic methodology that will cull out those claims that have not been fairly presented to the state courts. The greatest concentration of resources should be devoted to the merits of claims that are properly in the federal courts. To this end, the definition and determination of fair presentation should be as simple, efficient, and realistic as possible.

The analysis employed by Oregon would greatly facilitate the states' efforts to target their resources where they belong – at the merits of fairly presented federal claims. *Amici* states therefore ask this Court to grant the State of Oregon's petition for a writ of certiorari, and reverse the decision below.

REASONS FOR GRANTING THE WRIT

To satisfy the exhaustion requirements of 28 U.S.C. § 2254(b) and (c), state prisoners must "fairly present" their federal claims in state court before raising those claims in federal court. *See Anderson v. Harless*, 459 U.S. 4, 7 (1982) (discussing *Picard v. Connor*, 404 U.S. 270 (1971)). State prisoners must "alert" state courts that they are raising federal

claims – that is, they must "say so" in the state courts. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Prisoners must also present their claims before the state's highest court with jurisdiction to review those claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 – 49 (1999).

Taken together, *Duncan* and *O'Sullivan* stand for the proposition that state prisoners must set out explicitly their federal claims in a state's highest court. Requiring state prisoners to identify clearly their federal claims in state court eliminates the guesswork and subjectivity otherwise involved in determining whether state prisoners intended to raise federal claims in state courts and, if so, what federal claims they intended to present. At least two circuits follow *Duncan* and *O'Sullivan* and require state prisoners to be explicit in presenting their federal claims in the state's highest court before raising them in a *habeas* action. *See, e.g., Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002), *and Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000), *cert. denied* 531 U.S. 1193 (2001).

However, and unfortunately, the majority of circuits do not follow *Duncan* and *O'Sullivan*. Rather, these circuit courts employ analyses that attempt to discern whether the state prisoner presented the "substance" of his federal claim in state court. In the two prevailing lines of decision, surveyed in Oregon's petition, the inquiry is whether a state court judge reasonably could have viewed a prisoner's claims as having a federal ground. Because minimal expectation is placed upon prisoners in those jurisdictions, state attorneys find themselves devoting as much, if not more, time addressing the procedural default issue as the merits questions. Inevitably, those attorneys also find themselves responding to federal issues for the first time in the *habeas* action.

The Court accepted *O'Sullivan* to resolve the conflict among the circuits with regard to the highest court to which a claim must be presented. This case presents a similar need

and opportunity to settle a division among the circuits and define "fair presentment."

The State of Oregon's approach is consistent with this Court's recent pronouncements in requiring state prisoners to articulate explicitly in the state's highest court that they are raising federal claims. The briefing and presentment of the "fair presentment" issue is thereby simplified and unified, and no genuine hardship is placed upon prisoners who, in fact, intend to and do raise federal claims in state proceedings. Adoption of Oregon's approach by this Court will resolve the conflict among the circuits in a manner that greatly simplifies the litigation of *habeas corpus* actions, and preserves in the states the resources to devote to the merits of properly preserved federal claims.

CONCLUSION

For the reasons set forth above and in the State of Oregon's petition, the *amici* states respectfully request the Court grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals for the Ninth Circuit.

STEPHEN R. CARTER
Attorney General of Indiana
* GARY DAMON SECREST
Deputy Attorney General
Indiana Gov't Center South
5th Floor
402 West Washington Street
Indianapolis IN 46204
Telephone: (317) 232-6315

* *Counsel of Record for Amici Curiae*

GREG ABBOTT
Attorney General of Texas
PO Box 12548
Austin, TX 78711-2548

MIKE MCGRATH
Attorney General of Montana
215 N. Sanders
PO Box 201401
Helena, MT 59620-1401

G. STEVEN ROWE
Maine Department of the
Attorney General
6 State House Station
Augusta, ME 04333

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Bldg.
207 W. High Street
Jefferson City, MO 65101

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, Rm 26-E
Charleston, WV 25305

JON BRUNING
Attorney General of Nebraska
State Capitol
PO Box 98920
Lincoln, NE 68509-8920

GREGG D. RENKES
Attorney General of Alaska
PO Box 110300
Juneau, AK 99801

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

WILLIAM H. SORRELL
Office of the Attorney
General
109 State Street
Montpelier, VT 05602

LARRY LONG
Attorney General of
South Dakota
500 E. Capitol Ave.
Pierre, SD 57501-5070

MIKE MOORE
Attorney General of
Mississippi
PO Box 220
Jackson, MS 39205-0220

LAWRENCE WASDEN
Attorney General of Idaho
Statehouse
Boise, ID 83720-0100

CHRISTINE GREGOIRE
Attorney General of
Washington
1125 Washington Street SE
Olympia, WA 98504-0100

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman Street
7th Floor
Denver, CO 80203

(10)

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In the Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
*MARY H. WILLIAMS
Solicitor General
JANET A. KLAPSTEIN
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

*DENNIS N. BALSKE
Assistant Federal Public Defender
101 SW Main Street
Portland, Oregon 97204
Phone (503) 326-2123
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED December 2, 2002
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NOTICE

The following items have been omitted in printing this appendix because they appear on the following page in the printed appendix or supplemental appendix to the petition for a writ of certiorari:

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Magistrate judge's findings and recommendation ..... Supp. App-1

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON (PORTLAND)

CIVIL DOCKET FOR CASE #: 3-98-00851-ST

MICHAEL REESE

v.

GEORGE BALDWIN, SUPERINTENDENT

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
07/10/1998	2	Petition for Writ of Habeas Corpus (2254) -- Conditions of Confinement (State) -- against *George Baldwin, Superintendent* Filing Fee collected. Receipt#: N/A issued. Filed by Michael Reese (Kirk,) (Entered: 03/24/2000)
07/10/1998	3	Motion for Appointment of Counsel. Filed by Michael Reese. (Kirk,) (Entered: 03/24/2000)
07/30/1998	4	Order: Granting Petitioners Motion for Appointment of Counsel (Related Doc #3); Federal Public Defender appointed; Signed 7/30/98 by Judge Janice M. Stewart. (Kirk,) (Entered: 03/27/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
12/09/1998	11	Answer to Habeas Petition (2254) *Response to Habeas Corpus Petition*. (Related Doc # 2) (related document(s)2) Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
12/09/1998	12	Exhibits *to Answer*. (related document(s)11) Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
12/09/1998	13	Motion *to Deny Habeas Corpus Relief*. Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
12/09/1998	14	Memorandum in Support *of Motion to Deny Habeas Corpus Relief*. Filed by George Baldwin. (Related motion(s)13) (Kirk,) (Entered: 03/27/2000)
03/11/1999	19	Amended Petition for Writ of Habeas Corpus (2254) (related document(s)2) Filed by Michael Reese (Kirk,)(Entered: 03/27/2000)
03/11/1999	20	Memorandum in Opposition *to Respondents Motion to Deny Habeas Corpus Relief*. Filed by Michael Reese. (Related motion(s)13) (Kirk,) (Entered: 03/27/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
04/06/1999	22	Response to Motion *for Leave to Amend Habeas Corpus Petition*. Filed by George Baldwin. (Related motion(s)18) (Kirk,) (Entered: 03/27/2000)
08/27/1999	38	Reply *Memorandum in Response to Petitioners Amended Petition & Memorandum and Objections to Petitioner's Exhibits*. (related document(s)19) Filed by George Baldwin. (Hickman, Camile) (Entered: 04/17/2000)
09/30/1999	39	Response *b Petitioner to Respondents Reply Memorandum*. Filed by Michael Reese. (Kirk,) (entered: 03/27/2000)
01/04/2000	40	Findings & Recommendations: Amended Habeas Corpus Petition SHOULD BE DENIED on Petitioners 1st ground for relief, conditionally GRANTED on Petitioners 4th ground for relief & DENIED as premature on Petitioners 2nd & 3rd grounds for relief. Accordingly, the State of ORegon should be required to reinstate Petitioners direct appeal from his second re-sentencing & to appoint counsel to represent Petitioner on that appeal; Signed on

DATE	DOCKET NUMBER	PROCEEDINGS
		1/3/2000 by Judge Janice M. Stewart. (related document(s)19) Objections to the Findings and Recommendation due by 1/24/2000). Response to the objection to the F & R due by 2/10/2000. (Kirk,) (Entered: 03/27/2000)
03/15/2000	45	Motion for Reconsideration. Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
03/15/2000	46	Memorandum in Support *by Respondent of Motion For Reconsideration*. Filed by George Baldwin. (Related motion(s)45) (Kirk,) (Entered: 03/27/2000)
03/28/2000	49	Memorandum in Opposition *to Motion for Reconsideration*. Filed by Michael Reese. Reply due by 4/11/2000. (Related motion(s)45) (Kirk,) (Entered: 03/30/2000)
06/08/2000	50	Order Granting Motion for Reconsideration (Related Doc #45) and withdrawing Findings & Recommendation (Related Doc #40). Signed June 8, 2000 by Judge Janice M. Stewart. (St,) (Entered: 06/08/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
06/08/2000	51	Amended Findings & Recommendations: Signed on 6/8/2000 by Judge Janice M. Stewart. (related document(s)19) Objections to the Amended Findings and Recommendation due by 6/26/2000. Response to the objections due by 7/14/2000. (St,) (Entered: 06/08/2000)
07/10/2000	54	Objections to Findings & Recommendation *(Amended) Request for Oral Argument.* Filed by George Baldwin. (Related motion(s) 51) (Kirk,) (Entered: 07/10/2000)
08/01/2000	55	Record of Order by Judge Janice M. Stewart: Findings & Recommendations filed June 8, 2000, referred to Judge James A. Redden. Objections have been filed,(related document(s)51). (da,) (Entered: 08/01/2000)
09/14/2000	58	Affidavit of *the Honorable Mary J. Deits, Chief Judge of the Oregon Court of Appeals*. Filed by George Baldwin. (Kirk,) (Entered: 09/15/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
09/14/2000	59	Affidavit of *James W. Nass, Appellate Legal Counsel for the Oregon Court of Appeals*. Filed by George Baldwin. (Kirk,) (Entered: 09/15/2000)
09/14/2000	60	Record of Hearing before Judge James A. Redden on the Amended Findings and Recommendation and the defendant's objections (related document(s)51, 54). Respondent's supplemental brief due within 10 days by 9/25/2000. Petitioner is to advise the court if he will be filing a response; any response would be due after the supplemental brief. (dls,) (Entered: 09/19/2000)
09/26/2000	61	Supplemental Brief *Supplemental Briefing on Retroactivity*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
09/26/2000	62	Memorandum *Supporting Admission of Fical Impact Affidavits*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
09/26/2000	63	Affidavit of *David E. Groom, State Public Defender*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
09/26/2000	64	Affidavit of *Timothy M. Wood, Chief Trial Counsel, Trial Division, Oregon Department of Justice*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
09/26/2000	65	Affidavit of *Timothy A. Sylwester, an Attorney-In-Charge, Appellate Division, Oregon Department of Justice*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
11/27/2000	66	Opinion & Order: I Adopt the Magistrate Findings & Recommendation that the amended Petition be denied as to the first ground for relief; I decline to adopt the Magistrate Judge's Findings & Recommendation as to the Second, Third & Fourth grounds for relief; those claims are denied & the state of Oregon is not required to reinstate Petitioners direct appeal from his second resentencing; Signed 11/27/00 by Judge James A. Redden. (related document(s)19) (Kirk,) (Entered: 11/28/2000)
12/06/2000	67	Judgment: Based on the record, IT IS ORDERED AND ADJUDGED that Petitioner's amended habeas corpus petition is denied and judg-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment is entered in favor of respondent. IT IS SO ORDERED. Signed 12/6/2000 by Judge James A. Redden. (related document(s)19) (da,) (Entered: 12/06/2000)
12/18/2000	68	Motion to Alter/Amend/Correct *Judgment*., Motion for Reconsideration. Response due by 1/2/2001. Filed by Michael Reese. (Kirk,) (Entered: 12/21/2000)
01/08/2001	69	Response to Motion *Response to Petitioners Motion for Reconsideration & to Alter or Amend Judgment.* Filed by George Baldwin. Reply due by 1/22/2001. (Related motion(s)68) (Kirk,) (Entered: 01/10/2001)
01/22/2001	70	Opinion & Order: Denying Petitioners Motion to Alter/Amend/Correct (Related Doc #68)& Order Denying Petitioners Motion for Reconsideration (Related Doc #68). Signed 1/22/01 by Judge James A. Redden. (See formal 4-Page Opinion & Order) (Kirk,) (Entered: 01/23/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
01/26/2001	71	Notice of Appeal to. *9th Circuit Court of Appeals from the Judgment entered on 1/22/01*. (related document(s)67) Filed by Michael Reese. (Kirk,) (Entered: 01/29/2001)
01/31/2001	72	Certificate of Appealability. Signed 1/31/01 by Judge James A. Reddin. (related document(s)71) (Kirk,) (Entered: 02/09/2001)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOCKET NO. 01-35153

MICHAEL REESE

v.

GEORGE H. BALDWIN

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/15/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : n. setting schedule as follows: appellant's opening brief is due 5/14/01; appellees' brief is due 6/13/01. [01-35153] (tm)
5/21/01	Filed original and 15 copies Appellant Michael Reese opening brief (Informal: n) 35 pages and five excerpts of record in 1volumes; served on 5/14/01 [01-35153] (tm)
6/29/01	Filed original and 15 copies appellee George H. Baldwin's 53 pages brief, served on 6/27/01 [01-35153] (tm)
7/30/01	Filed original and 15 copies Michael Reese reply brief, (Informal: n) 29 pages; served on 7/25/01 [01-35153] (tm)

DATE	PROCEEDINGS
11/9/01	ARGUED AND SUBMITTED TO Procter R. HUG, Thomas G. NELSON, Ronald M. GOULD [01-35153] (ms)
1/29/02	Filed Michael Reese additional citations, served on 1/25/02 (PANEL) [01-35153] (tm)
3/12/02	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Procter R. HUG; Thomas G. NELSON, dissenting; Ronald M. GOULD, author.) FII ED AND ENTERED JUDGMENT. [01-35153] (tm)
4/30/02	[4420389] Filed original and 50 copies Appellee George H. Baldwin petition for rehearing with suggestion for rehearing en banc 18 p.pages, served on 4/23/02 (PANEL AND ALL ACTIVE JUDGES) (tm)
5/30/02	Filed order (Ronald M. GOULD): Appellants' are ordered to file a response to the Petition for Rehearing. The response is not to exceed 18 pages, and must be filed no later than 21 days from the date of this order. (response is due 6/21/02) (Atys. notified, Faxed to Panel) [01-35153] (tm)
6/17/02	Filed Appellant's response to petition for rehearing and suggestion for rehearing en banc; served on 6/14/02 (PANEL AND ALL ACTIVE JUDGES) [01-35153] (tm)

DATE	PROCEEDINGS
9/3/02	Filed order (Procter R. HUG, Thomas G. NELSON, Ronald M. GOULD): The petition for enbanc rehearing is DENIED. [01-35153] (tm)
9/11/02	MANDATE ISSUED [01-35153] (tm)
12/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-964 filed on 12/2/02. [01-35153] (tm)
6/2/03	Received letter from the Supreme Court dated 5/27/03 re: motion for leave to proceed ifp is granted. The petition for a writ of certiorari is granted. [01-35153] (tm)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF UMATILLA

In the Matter of the Application of:	Case No. CV96 0561
MICHAEL REESE, Petitioner, vs. G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution, Defendant.	PETITIONER'S FIRST AMENDED PETITION FOR POST CONVICION RELIEF (ORS 138.510 et seq.)

COMES NOW the Petitioner, Michael Reese, by and through his attorney, Wade P. Bettis, Jr., of Bettis & Penz, and alleges as follows:

1

Petitioner is imprisoned in the Eastern Oregon Correctional Institution at 2500 Westgate, Pendleton, Oregon, and is unlawfully confined and restrained of liberty by the above-named Defendant.

2

The offense with which Petitioner was charged was that of Kidnapping I – 2 counts, Attempted Sodomy I. Petitioner was convicted of Kidnapping I – 2 counts by a trial without jury.

3

Petitioner's imprisonment is by virtue of a judgment and a sentence imposed by the Polk County Circuit Court in the case of The State of Oregon vs. Michael Reese, Case No. 91P-3012. The judgment sentences Petitioner to 260 months to run concurrent 260 months for Kidnapping, to run consecutive a 36 months for Attempted Sodomy. Imprisonment is by the Corrections Division.

4

Appeals regarding the issues of sentencing was taken from said conviction, and no prior proceedings under the Post Conviction Act have been taken.

5

Petitioner, at the present time, is financially unable to retain counsel. At all times material herein, Petitioner was represented by attorney David Hassenstab 236 SW Mill, Dallas, Oregon, at trial and sentencing in 1991. Mr. Hassenstab also represented Petitioner in Petitioner's first re-sentencing in March, 1993. Petitioner appealed and was represented by Sally Avera and William Barton on this third appeal which was affirmed without opinion in 1995.

6

Petitioner believes the sentence was and is illegal in the proceedings as set forth above which have resulted in a substantial denial of Petitioner's rights in violation of ORS 138.530 as follows:

(a) The Court imposed an excessive and improper sentence when it sentenced Petitioner to consecutive sentences;

(b) The Court imposed an unlawful and improper sentence when it sentenced Petitioner as a dangerous offender pursuant to ORS 161.725 to ORS 161.735;

(c) The Court imposed an improper and excessive sentence when it departed from the sentencing guidelines presumptive sentence;

(d) The Court accepted the waiver of jury without properly determining whether said jury waiver was voluntarily and intelligently made;

(e) The Court failed to insure that Petitioner received a fair and impartial trial when it allowed evidence of prior bad acts without first determining if presentation of said evidence was relevant or if the probative value of such evidence had been proven; and

(f) The Court erred when it disregarded the decision made by the Court of Appeals and imposed a sentence on Petitioner which dissented from the directions of the Court of Appeals.

7

Petitioner was denied adequate assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that defense counsel failed to:

(a) Fully and properly investigate and prepare Petitioner's case including but not limited to, obtaining the victim's report and records which would have shown inaccuracies and false statements made by the victim at trial;

(b) Adequately represent Petitioner at trial and sentencing;

(c) Properly advise and counsel Petitioner regarding the ramifications of his waiver of jury as opposed to proceeding to a jury trial;

(d) Object to the Court's failure to ascertain whether the jury waiver was voluntarily and intelligently made;

(e) Provide Petitioner with professional advise and/or guidance regarding the charges against him;

(f) Failed to present evidence and facts important to Petitioner's case, including but not limited to the interviewing and subpoenaing of witnesses to testify on behalf of Petitioner.

(g) Move for Omnibus Hearing or file a Motion in Limine regarding prosecution's entering evidence of prior bad acts;

(h) Move for mistrial when Court unlawfully allowed evidence of prior bad acts when criteria for entering of such evidence had not been met;

(i) Withdraw as counsel when it became evident that Petitioner was not satisfied with his representation and requested that he withdraw from his case;

(j) Properly inform the court that Petitioner had not waived his right to appear and request a continuance. Instead, counsel appeared without Petitioner and a sentence was issued;

(k) Object to prosecution's unfounded allegation that Petitioner was suffering from a severe personality disorder.

8

PROSECUTORIAL MISCONDUCT

Petitioner was denied a fair trial by the Prosecution when the District Attorney, Fred Avera, engaged in misconduct that

severely prejudiced Petitioner's Constitutional rights which was a substantial violation of Petitioner's rights and is prosecutorial misconduct. More specifically the prosecution:

a. Called witnesses to testify against Petitioner when the witnesses could not identify Petitioner;

b. Entered into evidence certain information which he had previously agreed not to refer to during the trial and;

c. Petitioner was arraigned by Indictment on January 2, 1991. Fred Avera, without properly amending the indictment, unlawfully changed the date of indictment to January 9, 1991.

9

Petitioner was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United State and under Article I, Section 11, of the Constitution of Oregon, in that counsel on appeal failed to:

a. Withdraw as attorney for Petitioner due to conflict of interest in that her husband, Fred Avera, had been the attorney for prosecution three times on Petitioner's cases;

b. Notify Petitioner in advance when she removed Petitioner's attorney David Allen, from Petitioner's case and became attorney of record for Petitioner without Petitioner's consent;

c. Raise issues that had been preserved for appeal;

d. File a timely Notice of Appeal;

e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

Taken alone or in any combination, the above caused prejudice to the Petitioner.

WHEREFORE, Petitioner prays for an Order:

1

Reversing the conviction and sentence in the case of The State of Oregon vs. Michael Reese, Case No. 91F-3012, in the Circuit Court of the State of Oregon for the County of Polk;

2

Releasing Petitioner from custody of the Defendant; and/or

3

Modifying the sentence; and

4

For such further relief as this Court deems just and proper.

DATED this 4 day of November, 1996.

BETTIS & PENZ

By s/Wade P. Bettis, Jr.
WADE P. BETTIS, JR.
OSB #72025
Attorneys for Petitioner
1906 Fourth Street
La Grande, OR 97850
Telephone: (541) 963-3313

[Certificate of service omitted in printing.]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTIES OF MORROW AND UMATILLA
Department No. 1

RUDY M. MURGO **TELEPHONE NO. 541-278-0341**
DISTRICT COURT JUDGE **FAX NO. 541-278-0341**

Michael Lloyd Reese

Petitioner,

vs.

CV960561

G.H. BALDWIN Superintendent Eastern Oregon Correctional Institution,

MEMORANDUM OF OPINION

Defendant.

I. THE PLEADINGS

A. THE PETITION

This is a petition for post-conviction relief. The first amended formal petition was filed on 6 November 1996. His allegations of violations of his ORS 138.530 rights are set forth on pages 2 through five of his petition.

B. THE ANSWER

The defendant filed his answer on 15 November 1996. He denies the allegations. He also raises two affirmative defenses. First that the claims are barred under the rule of ***Palmer v. State of Oregon***, 318 Or 532 (1994).

He also alleges the claims that could have been raised on direct appeal are barred.

II. THE HEARING

A. 21 MARCH 1997

A hearing was held on 21 March 1997. Petitioner was personally present and appeared with his counsel, Mr. Wade Bettis, Jr. Esq. Defendant appeared through his legal counsel, Mr. Tom Denny, Esq., Assistant Attorney General.

B. EXHIBITS

The following exhibits were offered by the defendant and were admitted into evidence.

Number	Description
101	Second Amended Judgement
102	Presentence Investigation
103	Transcript
104	Petitioners Deposition
105	District Attorney Affidavit
106	Defendant's Trial Counsel Affidavit

C. TRIAL MEMORANDUM

The court received the trial memorandum submitted by the defendants legal counsel as well as the memorandum prepared by the petitioner himself.

D. WITNESSES

The defendant testified personally at the hearing.

III. FACTS

The petitioner is presently incarcerated in the Eastern Oregon Correctional Institution in Pendleton, Oregon. He is

serving terms of 260 months for kidnapping in the first degree, 260 months concurrent to the kidnapping charge for a second count of kidnapping in the first degree. He is also serving a sentence of 36 months consecutive to the kidnapping sentences for a conviction for attempted sodomy in the first degree. (See exhibits 101 and 103). His latest sentencing was after the case had been remanded to the trial court for resentencing. Id. At the time of the latest sentencing the District Attorney withdrew his request for a dangerous offender sentence and the court using a "durational departure" doubled the presumptive sentence of 130 months to 260 months for counts 1 and 2. It stated the aggravating factors on the record pursuant to the guidelines. The prior sentence on the sodomy charge remained the same. The defendant has a substantial criminal record for similar past crimes. (See exhibit 102). The defendant was convicted of the above crimes by the court, after the defendant had executed a written waiver of jury. (See exhibit 105, exhibit A).

IV. LEGAL ANALYSIS

A. BURDEN OF PROOF

The burden of proof in this case is on the petitioner. ORS 138.620(2).

B. ALLEGED TRIAL COURT ERROR

1. Sentencing

The allegation that the petitioner received an unlawful dangerous offender sentence is factually inaccurate. The court made the factual findings for both upward departure sentences and for the consecutive sentence. ORS 137.123(5).

2. Waiver Of Jury

This Claim lacks merit. It could have been raised on direct appeal and was not. ORS 138.550. The court also inquired of the petitioner before proceeding to a judge trial. (See exhibits 105 and 106).

3. Fair and Impartial Trial

This claim is barred under the rule of Palmer, supra.

4. Re-Sentencing

This allegation is meritless. The trial court followed the direction of the Oregon Court of Appeals.

C. ADEQUATE ASSISTANCE OF COUNSEL

Petitioner received adequate assistance of trial counsel. ***Strickland v. Washington***, 466 U.S. 668 (1984). See also ***Krummacher v. Gierloff***, 290 Or 867 (1981).

D. ADEQUATE INVESTIGATION

In his deposition, petitioner testified about the work of the investigator including talking to the defendant, visiting the crime scene and interviewing witnesses. (See exhibit 104).

E. ADEQUATE APPELLATE COUNSEL

Appellate counsel need not present every colorable issue. ***Jones v. Barnes***, 463 U.S. 745 (1983).

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V. CONCLUSION

Petitioner's claim for post-conviction relief is without merit. It is denied. Mr. Denny will prepare the appropriate order, submit it to Mr. Bettis for approval as to form and then submit it to the court for signature. Thank you both for your patience and professional courtesies.

Sincerely,

s/Rudy M. Murgo
Rudy M. Murgo
District Court Judge

RMM/mlh

cc: The Honorable John W. Hitchcock

CIRCUIT COURT OF OREGON

UMATILLA COUNTY

MICHAEL L. REESE,

Petitioner,

v. No. CV96-0561

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution, JUDGMENT

Defendant.

The above case came on for trial on March 21, 1997, before the Honorable Rudy M. Murgo. Petitioner appeared in person and by his attorney, Wade Bettis, Jr., and defendant appeared by and through his attorney, Thomas Castle, Assistant Attorney General.

The court, having considered all evidence and arguments before it,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that, based on the Court Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

DATED this 18 day of July, 1997.

s/Rudy M. Murgo
Rudy M. Murgo
Circuit Court Judge

Submitted by: Curt H. Pham
Assistant Attorney General
of Attorneys for Defendant

Court Reporter:

[Certificate of service omitted in printing.]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHAEL L. REESE,

Petitioner-Appellant,

v.

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution,

Defendant-Respondent.

Trial Court
Case No. CV96-0561

PETITION FOR POST-CONVICITION RELIEF

Appellate Court
Case No. A98705

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Umatilla County
Honorable Rudy M. MURGO, Judge

MARC GELLER #97126
Attorney at Law
109 East 5th Street
The Dalles, Oregon 97058
Telephone: 541-296-1127

Attorney for Appellant

HARDY MYERS #64077
Attorney General
VIRGINIA L. LINDER
#80294
Solicitor General
400 Justice Building
Salem, Oregon 97310
Telephone: 503-378-4402

Attorneys for Respondent

Statement of Facts

This is a petition for post-conviction relief. Petitioner appeals the Judgment dismissing the petition.

The Petitioner is presently incarcerated in the Eastern Oregon Correctional Institution.

Petitioner is serving terms of 260 months for kidnapping in the first degree, and 260 months concurrent to the kidnapping charge for a second count of kidnapping in the first degree. Petitioner is also serving a sentence of 36 months consecutive to the kidnapping sentence for a conviction of attempted sodomy in the first degree.

Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury trial, failure to provide a fair and impartial trial, improper re-sentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

ARGUMENT

This brief is submitted in accordance with ***State v. Balfour***, 311 Or 434, 451-53, 814 P2d 1069 (1991), and pursuant to the provisions of Oregon Rule of Appellate Procedure 5.90.

The standard of review herein is whether the previous court committed an "error substantially affecting the rights of a party." ORS 19.125(2).

Respectfully submitted,

s/Marc Geller
Marc Geller OSB #97126
Attorney for Appellant

APPELLANT'S BRIEF

PART B

ARGUMENT (CON'T)

Petitioner's claims of error are set forth in Petitioner's Petition for Post Conviction Relief. The Petition is set forth, in pertinent part, below.

* * *

1

[P]etitioner's is unlawfully imprisoned and restrained of liberty by respondent at the Eastern Oregon Correctional Institution (EOCI), Pendleton, Umatilla County, Oregon.

2

Petitioner's imprisonment is by virtue of a judgment and sentence imposed by the Polk County Circuit in the case of State of Oregon v. Michael Lloyd Reese, Case No. 91P-3012; conviction date February 1991; sentencing date July 1991; the sentencing judges name was the Honorable John W. Hitchcock; and sentence imposed was 30 years run concurrent with 30 years run consecutive with 36 months.

3

Petitioner was originally charge by indictment with the offenses of: count one, Kidnaping in the first degree, and count two, of Kid-

naping in the first degree, and count three, of attempted Sodomy in the first degree. And was convicted of all three counts after a trial by Judge.

4

Petitioner was represented at trial level by David Hassenstab Attorney at Law for County of Polk's Public Defenders Office

5

Petitioner did appeal and appeal was undertaken to the court of Appeals and the result was: sentence was overturned in December 1992 and resentencing was done in March 1993. The attorney of record was David K. Allen, Deputy Public Defender.

6

Petitioner did re-appeal and appeal was undertaken by the Court of Appeals and again sentence was vacated by the Court of Appeals in July 1994. The attorney of the record was David K. Allen Deputy Public Defender and on the brief was Sally L. Avera, Public Defender.

7

Petitioner did appeal resentencing of September 12, 1994 after being held illegally by Yamhill County on the order of Theodore R. Kulingoski #70080, Attorney General. Appeal was AFFIRMED WITHOUT OPINION and was filed with the court's on May 31, 1995.

The petitioner was represented on record by Sally L. Avera. Appeal was not undertaken to the Supreme Court because the Oregon Public Defender's office refused at the last minute to file a petition for review for the Plaintiff at the request of the petitioner as will be shown on record.

8

Petitioner has not previously applied for Post-Conviction Relief pertaining to this case dated May 31, 1995, case number 91P-3012; Appellant number CA A85890.

9

Petitioner is informed and believes his imprisonment is illegal or unlawful and obtained in violation of ORS 138.530 and that my incarceration is a hazard to my well being because:

First Claim for Relief: Conflict of interest involving the representation of Sally L. Avera on April 26, 1995.

Facts: On April 26, 1995 the case of petitioner was argued or submitted before the court of Appeals before Richardson, Chief Judge, and Deits and De Muniz, Judges. Attorney for Appellant is listed as Sally L. Avera, and attorney for respondent: Virginia L. Linder, the case was Affirmed Without Opinion. This case CAA85809 lists Sally L. Avera as Attorney for Appellant. This is a conflict of interest in that

her husband one Fred E. Avera prosecuted my case in the county of Polk.

Petitioner also claims that because of this conflict of interest that Sally L. Avera did willfully and knowingly agree with the State Prosecutors office to fire my Attorney Mr. David Allen and assign to me one Jesse Wm. Barton to replace one Mr. David Allen without any forewarning or fore-knowledge by the petitioner in said case.

Second Claim for Relief: Ineffective Assistance of Appellate Counsel.

Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter a notice of my intention to appeal in the Oregon ruling to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this is per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

Third Claim for Relief: Prosecutorial Misconduct.

Facts: Failure to Disclose Favorable Evidence. Fred E. Avera did willfully and knowingly withhold evidence that was relevant to my case and did enter into agreement with my Attorney David Hassenstab to keep said evidence out of court. This evidence being a photo showing that I had no black eye when arrested and my clothes which were covered with mud and witnesses state to the opposite. Also the prosecutor had the witness testify against me when said witness could not identify me as the one whom he testified against.

Prosecutor did knowingly and willfully show prejudice in my case by leading the Judge to illegally sentence me in the courts and disregard my constitutional rights.

Prosecutor did conspire with the courts of the State of Oregon to have me represented by illegal counsel when sent back to court for the third time on resentencing. The State did appoint me different counsel without regard for my rights as an individual.

Fourth Claim for relief: Ineffective Assistance of Counsel.

Facts: During my resentencing on September 19, 1995 the courts sent one Chris Lilleguard to represent me at my resentencing. I informed him that I did not except him as my attorney for the courts knew that I was being illegally detained at Yamhill County for the last 60 days and ~~failed~~ to inform me that I was given new counsel. The attorney than went to

court claiming that I refused to be present at my resentencing and came back and told me I could appeal my sentence. I stated he had no right to represent me. He then went back to court and had me called down, at which time the judge had me go pro se without proper representation. I objected to this but the Judge went ahead and resentenced me as the Courts had discussed ahead of time.

Fifth Claim for relief: Illegal incarceration by the order of the attorney Generals office.

Facts: In July 1995 the attorney Generals office did order me removed from Oregon State Prison and had me Illegally transferred to Yamhill County to hold me under false pretenses that I had a detainer in said county. But I was held there while the courts of Polk County took their time in deciding what they would do with me. This was done illegally and with intent to bring me undo pressure and to deprive me of due process under the Constitution of the United State and the statutes of the State of Oregon.

Sixth Claim Of Relief: Ineffective Assistance of Trial counsel.

Facts: Attorney David Hassenstab of Dallas Oregon, the county of Polk did fail to exercise professional skill and judgment in his acts and omissions which did effect the prosecution. This failure made it easier for me to be convicted. Mr. Hassenstab failed to object to and question witnesses with loyalty and pre-

sent evidence that was relevant to my defense. Mr. Hassenstab failed to use the private investigator whom presented him with evidence that there was no way that the crime could have been perpetrated as the witnesses stated. And that the investigation by the police was done weeks after the fact leaving out pertinent information.

Seventh Claim for Relief: The trial court erred when it did disregard the Court of Appeals' decision and sentencing defendant with prejudice, and without regard to Oregon law and Statutes.

Facts: The reason that this act is error and justifies relief on Post-Conviction is that according to the records and the decision of the Court of Appeals, the issue was that defendant's sentence should have been 121 to 130 months as a departure sentence. Also when the State of Oregon dropped the dangerous offender sentences they also dropped any reason for any upper departure sentence. And without the departure sentence the defendant's sentence should have not exceeded Grid 9-A with a sentence of 72-80 months, that going to gridblock 10-A was a departure sentence in itself.

Eighth Claim of Relief: The trial court erred when it found defendant guilty with prejudice, and without regard to constitutional and Oregon laws and Statutes governing a fair trial.

Facts: The reason this error justifies relief is that the court of Polk County before Judge Hitchcock was illegal and showed prejudice. At a pre-trial hearing, Judge Luukinen of Polk County withdrew himself from my case and ordered a judge to be brought in from another County. The prescutor Fred E. Avera, my attorney David Hassenstab, and Judge John Hitchcock did willingly violated said order. Also the defendant was denied a fair trial by giving the Judge a portfolio of the defendant's past thus prejudicing the case.

The following evidence was withheld from the trial courts that would have placed reasonable doubt on trial court's decision. (1) snow on the ground, (2) the defendant's clothing, (3) the alleged victim's record (which included giving false information to police officers), (4) the report of state hired investigator, and (5) the fact that the court allowed D. Peyton to testify for over an hour, giving derogatory testimony when the courts knew that said witness would not be able to identify defendant as assailant. Plus said witness did perjure himself when asked if he had discussed case with Rebecca Cantrel the alleged victim in the case when all the testimony was in fact hearsay and directed by prosecution.

Ninth Claim for Relief: Sentence was excessive and unconstitutional.

Facts: The courts applied an excessive sentence in which exceeded the maximum allowed

by law. The courts have twice found my sentence at trial to be illegal and unconstitutional. The court's did raise petitioner's sentence passed the appropriate grid as allowed by law as a departure sentence. Also the court's gave me consecutive sentences which apposed what was deemed a single episode or action. This and the length of sentence violated my eighth amendment rights to stand against cruel and unusual punishment.

Tenth Claim for Relief: Ineffective assistance of trial counsel:

Facts: Trial counsel David Hassenstab of Dallas, Oregon of Polk County did fail to investigate the facts and circumstances of the criminal charges at issue. This failure to present materials and facts in the case did lead to my conviction. I was coerced and threatened by counsel to waive my trial by jury, and to be tried by judge without a jury to ensure conviction. This against my amendment rights violating the 5th, 6th, and 14th amendment rights. Mr. Hassenstab did fail to challenge indictment that was filed with racial bias and discriminated without evidence or probable cause to commit crimes involved.

Appointed counsel was paid by respondent State as were Judge, and prosecutor to defraud the petitioner of all constitutional rights and to ensure conviction. This when counsel was facing unethical charges that were unbecoming to an attorney. Therefore said attorney did show

prejudice in said case when he implied to another prisoner that said petitioner was just another no good sex offender.

Eleventh Claim for Relief: Petitioner was and is denied the transcripts necessary to file a timely and accurate Post-Conviction.

Facts: The Petitioner in said case has filed to his appellant attorneys and to the courts of Polk County for the transcripts that pertained to Pre-trial transcripts before Judge Luukinen's Court, trial court proceeding and the court records before Judge Hitchcock in Feb. 1991. And also sentence procedure before Judge Hitchcock. I have sent copies and proof of service to Polk County Circuit Court and to Virginia Linder as was required. I was given no response from any of the people that I contacted. The State public Defenders Office did claim that said transcripts were sent to me by mail in Oregon State Prison in 1992 which I never received. I informed them that I never received said transcripts and was told that this was not their fault. I then informed them that I needed these transcripts and was informed that I would be held responsible for their replacement but was refused even the chance to replace them by the silence of the court and my attorneys office and the prosecutors office. Defendant can therefore show that the state prevented the discovery of necessary facts needed to raise the constitutional issues in this case.

And that procedural forfeiture is resulted from the ineffective assistance of counsel.

* * * *

The foregoing represents those statements in support of the claims of error asserted by Petitioner.

CONCLUSION

Based on the foregoing, Petitioner is entitled to Post-Conviction relief reversing the conviction and sentence, releasing petitioner from custody of Defendant and/or modifying Petitioner's sentence and for such further relief as the court deems just and proper.

Respectfully submitted:

s/Michael L. Reese

Michael L. Reese
SID# 3839164
2500 Westgate
Pendleton, OR 97801

ABSTRACT OF RECORD

PETITION

On May 22, 1996, petitioner filed a Petition for Post-Conviction Relief alleging, *inter alia*, ineffective assistance of counsel.

FORMAL PETITION

On August 28, 1996, petitioner filed a Formal Petition for Post-Conviction Relief, alleging, *inter alia*, ineffective assistance of counsel.

FIRST AMENDED FORMAL PETITION

On November 6, 1996, petitioner filed a First Amended Formal Petition for Post-Conviction Relief, alleging, *inter alia*, ineffective assistance of counsel.

ANSWER

On November 15, 1996, defendant filed an Answer to Petitioner's First Amended Formal Petition for Post-Conviction Relief, admitting petitioner's imprisonment, confinement and restraint of liberty by defendant, but denying that same is unlawful.

JUDGMENT

On June 18, 1997, based upon its findings of fact and conclusions of law, the court entered the following Judgment:

> The above case came on for trial on March 21, 1997, before the Honorable Rudy M. Murgo. Petitioner appeared in person and by his attorney, Wade Bettis, Jr., and defendant appeared

> by and through his attorney, Thomas Castle, Assistant Attorney General.
>
> The court, having considered all evidence and arguments before it,
>
> NOW, THERFORE, IT IS HEREBY ADJUDGED that based on the Court Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

* * * *

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHAEL L. REESE,

Petitioner-Appellant,

v.

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution,

Defendant-Respondent.

Umatilla County Circuit Court No. CV96-0561

CA A98705

ORDER OF SUMMARY AFFIRMANCE

Respondent has moved for summary affirmance pursuant to ORS 138.660 on the ground that this appeal presents no substantial question of law. Appellant has not opposed the motion. The motion is granted.

Affirmed.

s/Mary J. Deits
Chief Judge

FEB 9 1998
Date

C: Erika L. Hadlock
Mark Geller

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent [X] No costs allowed

NOTICE OF EXPENSES AND COMPENSATION

The appellate court has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665 to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses and compensation in the amount of $ 741.65.

Appellate Judgment COURT OF APPEALS
Effective Date: June 22, 1998 (seal)

APPELLATE JUDGMENT

IN THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL L. REESE,

Petitioner on Review,

v.

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution,

Respondent on Review.

Trial Court No. CV96-0561

CA No. A98705

PETITION FOR REVIEW OF MICHAEL L. REESE

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Umatilla County, Honorable Rudy M. MURGO, Judge.

Opinion Filed: July 18, 1997

Affirmed by the Court of Appeals by Motion for Summary Affirmance.

MARC GELLER #97126
Attorney at Law
105 Oak Street, Suite 205
Hood River, Oregon 97031
Telephone: 541-386-7400

Attorney for Appellant

HARDY MYERS #64077
Attorney General
MICHAEL D. REYNOLDS #74269
Solicitor General
400 Justice Building
Salem, Oregon 97310
Telephone: 503-378-4402

Attorneys for Respondent

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PETITION FOR REVIEW

Prayer for Review

Petitioner, Michael L. Reese, seeks review of the decision of the Court of Appeals dated February 9, 1998.

Statement of Legal Question(s) Presented on Review

Petitioner pleads several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Petitioner presents the legal question for review of whether his sentence is proper, particularly since he was subject to ineffective assistance of counsel and prosecutorial misconduct.

Statement of reasons for reversal of Court of Appeals

The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Statement of Facts

(A copy of the decision of the Court of Appeals is attached as App-1).

Petitioner is serving terms of 260 months for kidnaping in the first degree, and 260 months concurrent to the kidnapping charge for a second count of kidnapping in the first degree. Petitioner is also serving a sentence of 36 months consecutive

to the kidnapping sentence for a conviction of attempted sodomy in the first degree.

Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

Argument

The sentence levied upon the petitioner is improper in that Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Petitioner asserts that his imprisonment is in violation of ORS 138.530. Petitioner alleges that the sentence violates his eighth amendment rights against cruel and unusual punishment. Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated.

Statement of reasons why issue requires Supreme Court decision

Consideration of the criteria set forth in ORAP 9.07 demonstrates why discretionary review of this case should be granted by the Supreme Court.

Petitioner contends that the Court of Appeals decision is wrong, resulting in a serious and irreversible injustice to Petitioner that can not be corrected by legislative clarification. Relief to the Petitioner can only come from this court.

The issue is clearly set fourth in the appellate briefs.

CONCLUSION

Petitioner received an excessive sentence and stated a valid claim for post conviction relief.

A decision by this court is essential.

Respectfully Submitted;

s/Marc Geller

Marc Geller OSB 97126
Attorney for Petitioner

ABSTRACT OF RECORD

PETITION

On May 22, 1996, petitioner filed a Petition for Post-Conviction Relief alleging, *inter alia*, ineffective assistance of counsel.

FORMAL PETITION

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On June 18, 1997, based upon its findings of fact and conclusions of law, the court entered the following Judgment:

> The above case came on for trial on March 21, 1997, before the Honorable Rudy M. Murgo. Petitioner appeared in person and by his attorney, Wade Bettis, Jr., and defendant appeared by and through his attorney, Thomas Castle, Assistant Attorney General.

> The court, having considered all evidence and arguments before it,
>
> NOW, THEREFORE, IT IS HEREBY ADJUDGED that based on the Court Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

APPELLATE DECISION

On February 9, 1998, the Court of Appeals filed a decision summarily affirming the trial court judgment.

[Appendix and certificate of service omitted in printing.]

Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE CLERK

No. 02-964

In the Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
JANET A. KLAPSTEIN
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

By statute and the Court's case law, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. The Court has held that exhaustion requires a state prisoner to fairly present his claim to the State's highest court and that fair presentment requires the prisoner to have alerted the state court that the claim is a federal one.

Does a state prisoner "alert" the State's highest court that he is raising a federal claim when—in that court—he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis?

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OPINIONS BELOW

The June 8, 2000 unpublished opinion of the magistrate judge of the United States District Court for the District of Oregon is reprinted in the supplemental appendix to the petition for writ of certiorari. The November 27, 2000 unpublished opinion of the United States District Court for the District of Oregon is reprinted in the appendix to the petition. App. to Pet. for Cert. 25-37. The March 12, 2002 decision of the United States Court of Appeals for the Ninth Circuit is published at 282 F.3d 1184 (9th Cir. 2002), and is reprinted in the appendix to the petition. App. to Pet. for Cert. 1-23.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 12, 2002. The State[1] timely filed a petition for rehearing and suggestion for rehearing *en banc*, which the court denied on September 3, 2002. App. to Pet. for Cert. 39. The State timely filed the petition for writ of certiorari on December 2, 2002. The Court granted the petition on May 27, 2003. The State invokes the Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

28 U.S.C. § 2254 provides, in part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

---

[1] This case involves numerous proceedings below and the labels attached to the parties changed accordingly. To avoid confusion, petitioner Baldwin refers to the parties as "Reese" and "the State" rather than by their roles in the various proceedings.

> (A) the applicant has exhausted the remedies available in the courts of the State;
> * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

In this federal habeas corpus case, Reese alleged that he received constitutionally ineffective assistance of counsel in the direct appeal from his third sentencing. The State responded that he had failed to exhaust his state-court remedies and is now procedurally barred from doing so. The question in this case is whether Reese fairly presented that claim to each of the State's appellate courts. The State sets out the relevant procedural history of Reese's case, focusing on the factual and legal grounds Reese asserted relating to the ineffective appellate counsel claim.

A. State court proceedings

1. Criminal conviction and direct appeal

Reese was convicted in state court of two counts of kidnapping and one count of attempted sodomy. The trial court imposed a determinate sentence of 30 years on the kidnapping convictions. On appeal, the Oregon Court of Appeals affirmed the convictions but remanded for resentencing because the trial court had left out a step in the sentencing process. *State v. Reese*, 114 Or. App. 557, 836 P.2d 737 (1992). The trial court resentenced Reese, Reese again appealed, and again the Oregon Court of Appeals remanded for resentencing because the trial court had not properly performed the additional step that

it had omitted from the first sentencing. *State v. Reese*, 128 Or. App. 323, 876 P.2d 317 (1994).

Following the third sentencing, Reese again appealed. His federal habeas corpus claim concerns the performance of Jesse Barton, Reese's court-appointed appellate counsel at this stage in the proceedings. Barton could find no non-frivolous issues in the appeal, so he filed a "*Balfour*" brief, which is Oregon's analogue to an *Anders* brief.[2] *See State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991). As required in a *Balfour* brief, Barton assisted Reese in presenting the issues Reese wished to raise on appeal; Reese raised five assignments of error. The Oregon Court of Appeals affirmed, without a written opinion. *State v. Reese*, 134 Or. App. 629, 894 P.2d 1268 (1995). Reese did not file a petition for review in the Oregon Supreme Court.

2. State post-conviction relief[3]

In Oregon, complaints about the performance of trial or appellate counsel are raised in a petition for post-conviction relief (PCR) in the state trial court. Or. Rev. Stat. §§ 138.510-138.680.[4] Reese initiated this process by filing a *pro se* peti-

---

[2] *Anders v. California*, 386 U.S. 738 (1967).

[3] In Oregon, there are two means of obtaining state-court review of state criminal convictions: the direct appeal and the post-conviction challenge. After completing the direct appeal, the state prisoner has two years to initiate post-conviction proceedings in the state trial courts. Or. Rev. Stat. § 138.510. The prisoner may not seek relief on an issue that reasonably could have been raised in the trial court and direct appeal. *Palmer v. State of Oregon*, 318 Or. 352, 354, 867 P.2d 1368 (1994). Those claims may be raised only in the context of an inadequate assistance of counsel claim. *Ibid.*

[4] The pertinent statutes and state rules of appellate procedure discussed in this brief are set out in the appendix.

tion. The PCR trial court appointed counsel, who filed an amended PCR petition asserting, among other claims, ineffective assistance of both trial and appellate counsel. The amended petition specifically cited provisions of the federal and state constitutions in support of Reese's claim that he had received ineffective assistance of appellate counsel in the direct appeal from his third sentencing:

> [Reese] was denied adequate[5] assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that counsel on appeal failed to:
>
> a. Withdraw as attorney for [Reese] due to conflict of interest in that her husband, Fred Avera, had been the attorney for prosecution three times on [Reese's] cases;[6]

[5] Article I, section 11, of the Oregon constitution provides, in part, "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" In applying this provision, Oregon courts often refer to "*inadequate* assistance of counsel" instead of "*ineffective* assistance of counsel," the term usually employed by state and federal courts in applying the analogous provision of the Federal Constitution. *See Krummacher v. Gierloff*, 290 Or. 867, 872 n. 3, 627 P.2d 458, 462 n. 3 (1981) ("[T]he term 'adequate' assistance of counsel may be more accurate than 'effective' assistance of counsel. Counsel cannot always be effective, but they must always be 'adequate' to the task.").

[6] In the amended petition, Reese's counsel referred to the state Public Defender, Sally Avera. Barton was the deputy public defender assigned by Avera to handle Reese's appeal from the third sentencing.

> b. Notify [Reese] in advance when she removed [Reese's] attorney David Allen, from [Reese's] case and became the attorney of record for [Reese] without [Reese's] consent;
>
> c. Raise issues that had been preserved for appeal;
>
> d. File a timely Notice of Appeal;
>
> e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

J.A. 17.

The trial court denied Reese's PCR petition in a written opinion. In denying Reese's ineffective assistance of appellate counsel claim, the trial court wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745 (1983)." J.A. 23. Based on that statement and the amended PCR petition, the parties agree that Reese presented a federal claim of ineffective assistance of appellate counsel in the post-conviction trial court, although the precise scope of the claim is unclear. The parties also agree that the trial court ruled on at least part of that claim.[7] The parties' disagreement centers on the legal significance of what happened next.

On appeal from the PCR trial court ruling, Reese's appointed counsel prepared another *Balfour* brief. As required

[7] The PCR trial court's ruling does not encompass each of the allegations of ineffective assistance of appellate counsel that Reese raised in the petition; it appears to be limited to the third claim that appellate counsel failed to raise issues that were preserved for appeal. Reese did not identify what issues he believed his appellate counsel failed to raise.

for a *Balfour* brief, counsel set forth the statement of the case and then, at Reese's request, incorporated into the brief claims of error that Reese had set out in his *pro se* PCR petition.[8] Included among the *pro se* claims was the following claim concerning the performance of Barton, Reese's appellate counsel for the third sentencing:

> Second Claim for Relief: Ineffective Assistance of Appellate Counsel.
>
> Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter [*sic*] a notice of my intention to appeal in the Oregon ruling [*sic*] to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this is per se ineffective assistance of counsel.
>
> Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's

[8] The Ninth Circuit mistakenly suggested that the responsibility for deciding to incorporate claims from Reese's original PCR petition, rather than the amended petition, into Reese's Court of Appeals brief was that of Reese's appellate counsel. App. to Pet. for Cert. 6. Under Oregon's *Balfour* procedure, it is the appellant who chooses which claims to present in the *pro se* portion of the brief, not counsel. *See Balfour*, 311 Or. at 452, 814 P.2d at 1080 ("Counsel * * * shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it."); *see also* Or. R. App. P. 5.90(1)(b) (incorporating *Balfour*'s requirements); App-7 to App-8. Reese signed the Part B portion of the brief which set out the claims from his *pro se* petition, verifying his decision to present those claims to the court. J.A. 39. *See* Or. R. App. P. 5.90(1)(b); App-7 to App-8.

> [*sic*] did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

J.A. 32.

The State moved for summary affirmance pursuant to Or. Rev. Stat. § 138.660, asserting that Reese's appeal presented "no substantial question of law." The Oregon Court of Appeals summarily affirmed the PCR trial court's judgment in an unpublished order. J.A. 42.

Reese's counsel then filed a petition for discretionary review in the Oregon Supreme Court. The petition in the Supreme Court was not submitted in accordance with the *Balfour* procedure; rather, it was fully prepared by Reese's counsel and did not include a *pro se* portion. The petition stated that one of the issues presented was the effectiveness of appellate counsel. The petition did not identify the specific manner in which appellate counsel was alleged to be constitutionally ineffective. The petition cited no constitutional provision or authority of any kind relating to that claim. The petition did not contain any factual basis for or argument in support of that claim. In its entirety, the "Argument" portion of that petition reads:

> The sentence levied upon [Reese] is improper in that [Reese] was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.
>
> [Reese] asserts that his imprisonment is in violation of [Or. Rev. Stat. §] 138.530. [Reese]

> alleges that the sentence violates his eighth amendment rights against cruel and unusual punishment. Moreover, since [Reese] asserts he was coerced and threatened by counsel to waive his right to trial by jury, [Reese] believes his 5th, 6th and 14th amendment rights have been violated.

J.A. 48. The Oregon Supreme Court denied review in an unpublished order.

B. Federal habeas corpus

1. District court

Reese next filed a *pro se* federal habeas corpus petition. The district court appointed counsel, who filed an amended petition that included a claim that Reese had received ineffective assistance of counsel on direct appeal from his third sentencing:

> Ground 4: Mr. Reese received ineffective assistance from his appellate counsel, who refused to raise any issues, failed to raise two meritorious issues, failed to withdraw, and failed to exhaust Mr. Reese's state remedies by refusing to file a petition for review in the Oregon Supreme Court.
>
> Supporting Facts: Following Mr. Reese's third sentencing proceeding, Mr. Reese again appealed. He was assigned new counsel, counsel different from counsel who had successfully appealed on two prior occasions. His new counsel informed him that he had no issues in the case, and that counsel would not be providing any legal argument in support of any issue. Rather, counsel advised Mr. Reese that he could file a *Balfour* brief, which would amount to preparation of the format of the brief for Mr. Reese, but Mr. Reese would have to provide any and all briefing and legal arguments of the issues he wished to raise. Mr. Reese filed a *Balfour* brief. He also advised his counsel that he wished his counsel to petition the Supreme Court for review, so that his issues would be exhausted for federal habeas corpus purposes. Mr. Reese's counsel did not file a petition for review. Instead he advised Mr. Reese that he could file his own petition, but that counsel would have to withdraw, and that counsel was familiar with the requirements for a petition for review, and Mr. Reese's issues did not meet this requirement because, in counsel's opinion, Mr. Reese had raised no issues in his *Balfour* brief.
>
> Counsel did not move to withdraw and did not provide the Court of Appeals or the Oregon Supreme Court with any possible issues which the court should consider. In short, he did not comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967).

J.A. 2, Docket number 19.

In response, the State argued that Reese had not properly exhausted his state remedies for the ineffective appellate counsel claim and that the claim was now procedurally defaulted. Supp. App. to Pet. for Cert. 32. The magistrate judge who heard the petition concluded that the claim set out above was not defaulted and, further, that Oregon's *Balfour* procedure is constitutionally defective. Supp. App. to Pet. for Cert. 32-49. The State filed objections.

The district court rejected the magistrate judge's recommendation and concluded that Reese had not properly exhausted in state court his federal claim of ineffective assistance of appellate counsel and that the claim was procedurally defaulted. The district court relied on a newly announced Ninth Circuit decision, *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). The district court explained that "the *Lyons* court concluded, '[t]he law of the law of this circuit is plainly that a federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one—regardless of whether the petitioner was proceeding pro se.'" App. to Pet. for Cert. 36 (citation omitted). The district court concluded that, "because of the holding of the Ninth Circuit in *Lyons*, I am compelled to conclude that petitioner's fourth ground for relief was not exhausted in the state courts, and is now procedurally defaulted." *Id.* The district court denied Reese's other claims and entered judgment dismissing his petition. App. to Pet. for Cert. 38.

2. Ninth Circuit Court of Appeals

Reese appealed to the United States Court of Appeals for the Ninth Circuit. The court noted that the only issue before it was the district court's determination that Reese had procedurally defaulted his claim of ineffective assistance of appellate counsel. App. to Pet. for Cert. 9. In a footnote, the court observed that, if there were procedural default, Reese could not satisfy the "cause and prejudice" requirement or demonstrate that the court's refusal to hear the claim would result in a "fundamental miscarriage of justice," excusing the procedural default. App. to Pet. for Cert. 9.

As discussed in greater detail below, the Ninth Circuit accurately described the requirements for proper exhaustion, including that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order

to exhaust it." App. to Pet. for Cert. 13. However, the court's application of those requirements clearly demonstrates that it does not consider it necessary for the state prisoner to present the federal nature of his claim to the state appellate courts in compliance with state appellate procedural rules.

The Ninth Circuit acknowledged that Reese did not cite federal authority in support of his ineffective assistance of appellate counsel claim in the state appellate courts. In spite of Reese's failure to present a clearly identified federal claim in the state courts, the Ninth Circuit concluded that Reese satisfied the exhaustion requirement because the state appellate courts "had the opportunity" to identify the federal claim through an independent review of the record. Nor did it matter to the Ninth Circuit whether the state appellate procedural rules foreclosed the state courts from reviewing Reese's claim even if those state courts had conducted the independent record review. The Ninth Circuit held that the comity concerns underlying the exhaustion requirement are satisfied where the state courts have the opportunity, in the Ninth Circuit's view, to identify and address a federal claim that the state prisoner has not presented explicitly.

The Ninth Circuit remanded the case to the district court to consider the merits of the ineffective assistance of appellate counsel claim. App. to Pet. for Cert. 19. The State filed a petition for rehearing and suggestion for rehearing *en banc*, which the court denied on September 3, 2002. App. to Pet. for Cert. 39. The State filed a petition for writ of certiorari with this Court on December 2, 2002, which the Court granted on May 27, 2003.

SUMMARY OF ARGUMENT

There is no disagreement in this case that state prisoners first must exhaust their federal claims in state court before the claim can be considered in a federal habeas corpus proceed-

ing. Nor is there any disagreement that proper exhaustion requires a state prisoner to fairly present his federal claim to the state courts through one complete round of review. This Court's decisions make that much clear. The issue presented in this case is whether a state prisoner properly exhausts a federal claim in state court when the prisoner fails to identify the federal nature of his claim to either the state's intermediate appellate court or the state's highest appellate court.

The Ninth Circuit concluded that "fair presentation" does not require a state prisoner to identify clearly the federal nature of his claim on appeal so long as that federal claim was raised in the trial court and the state appellate courts could ferret it out by searching the record. Thus, the Ninth Circuit transformed the "fair presentation" requirement, which places the burden on the state prisoner to alert the state courts to his federal claim, into a "fair opportunity" requirement that places the burden on the state appellate courts.

The Ninth Circuit's rule is wrong, at least in part, because it disregards the state's procedural requirements. Like most appellate courts, Oregon's appellate courts will not consider a claim that is not properly presented by the appellant. The Ninth Circuit's presumptions about how Oregon's appellate courts evaluate briefs and petitions such as those filed by Reese are unsupported by the state rules of appellate procedure and state case law. More importantly, while the Ninth Circuit acknowledged that the state appellate courts might have limited their review to only those issues Reese properly presented to them, the federal court concluded that any limitations on the state courts' independent identification and review of Reese's federal claim were irrelevant to the exhaustion question. That holding ignores this Court's pronouncements that comity requires the federal claim to be presented to the state court in compliance with the state court's procedural requirements. A state prisoner does not fairly present a federal

claim to the state court if he fails to follow the state court's procedural requirements and therefore presents the claim in a way that ensures the state court will not address it.

The States, state courts, state prisoners, and federal courts need clarification of the requirements for proper presentation of federal claims in state courts. The Ninth Circuit appears to have reached inconsistent conclusions about what proper exhaustion requires. It is not alone in its struggle to apply a test that readily distinguishes properly exhausted from unexhausted claims. As a result, litigants and federal courts spend a great deal of time and resources in federal habeas cases litigating and deciding whether state-court remedies were properly exhausted, and whether the claims are barred as procedurally defaulted.

Although the Court has provided much guidance about the factors that should be considered and the weight that should be given to competing factors, the Court also has left the door open to different tests for what fair presentation requires. The interests of the States, state courts, state prisoners, and federal courts would be better served by the imposition of a clear test.

The State urges the Court to clarify the rule in this area. The State proposes the following test as a clarification of the exhaustion requirement: To fairly present a federal claim in state court, a state prisoner must do two things. First, the state prisoner must present sufficient facts to support the claim. Second, the state prisoner must identify clearly the federal source of the claim by (a) citing the federal constitutional provision relied on, or (b) citing at least one reported case that expressly has decided the claim solely on a federal basis, or (c) expressly identifying a claim that necessarily must be based on a federal right. This unambiguous test satisfies the different interests of the courts and the parties, while imposing a manageable burden on state prisoners.

ARGUMENT

This case involves a question often presented to this Court: What is required for a state prisoner to properly exhaust a federal claim in state court before raising that claim in a federal habeas corpus proceeding?[9] This Court and Congress have made it clear that state prisoners must exhaust state-court remedies by fairly presenting their federal claims through one complete round of state-court review. From 1867, when Congress first extended federal habeas corpus to state prisoners, this Court has recognized the tension created when federal courts intercede in reviewing state criminal convictions. The Court consistently has cautioned federal courts to exercise carefully their discretion to hear federal habeas corpus challenges to state criminal proceedings and to refrain from disturbing the federal-state relationship "by unnecessary conflict between courts equally bound to guard and protect

[9] The exhaustion requirement refers only to remedies still available at the time of the federal habeas corpus petition. *Engle v. Isaac*, 456 U.S. 107, 126 n. 28 (1982). Technically, "exhaustion" is satisfied if the state prisoner's claim is procedurally barred under state law because no state forum is available to address the claim. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). However, that procedural bar provides an independent and adequate state-law ground for the conviction and sentence and, therefore, prevents federal habeas corpus review of the defaulted claim, unless the state prisoner can demonstrate cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). If, as the State asserts in this case, Reese failed to fairly present his federal claim of ineffective assistance of appellate counsel to the state appellate courts in the post-conviction appeal, he no longer has a state remedy available and thus has procedurally defaulted his claim. For ease of discussion, the State, at times, will refer to the "fair presentation" problem in this case as one of "exhaustion."

rights secured by the constitution." *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Since 1886,[10] the Court has addressed that federal-state tension by requiring state prisoners to exhaust their state-court remedies before a federal court may consider their claims in a federal habeas corpus proceeding. The Court has "consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" *Picard v. Connor*, 404 U.S. 270, 275 (1971) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

In spite of the direction from this Court, questions about whether a state prisoner has satisfied the exhaustion requirement continue to plague federal courts and the parties involved in federal habeas corpus litigation. This case presents the question of who carries the burden of identifying the federal nature of the claim in the state court proceedings: the state prisoner or the state court? The Ninth Circuit has taken the position that, if states are to be given a first opportunity to consider federal challenges to a state-court conviction, the state appellate courts are responsible for identifying the federal claim.

As discussed in more detail below, Reese asserted in the federal habeas corpus proceeding that he was denied his federal constitutional right to effective assistance of appellate

[10] Soon after it expanded federal habeas corpus to state convictions in the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385-386, Congress removed the Court's jurisdiction to hear appeals from those decisions and did not restore it until 1885. Act of March 27, 1868, c. 34, § 2, 15 Stat. 44; Act of March 3, 1885, c. 353, 23 Stat. 437; *see Ex parte McCardle*, 7 Wall. 506, 74 U.S. 506, 19 L.Ed. 264 (1869).

counsel on his direct appeal. In Oregon, claims of that type are raised in post-conviction relief (PCR) proceedings. Reese did raise a federal claim of ineffective assistance of appellate counsel in the state PCR trial court. In the intermediate state appellate court, Reese presented a general claim concerning ineffective assistance of his appellate counsel. But he presented little factual development and offered nothing to alert the state court that he was presenting a claim under the federal constitution. In the state's highest appellate court, Reese again made a vague reference to the effectiveness of his appellate counsel without factual development or any indication that he was asking the state court to address a claim based on the federal constitution.

The Ninth Circuit concluded that Reese had fairly presented his claim of ineffective assistance of appellate counsel because the state appellate courts could have reviewed the state PCR trial court's opinion and discovered a federal basis for the vague claim Reese presented. As the State will address in more detail, the Ninth Circuit's ruling is wrong for two reasons. First, it transforms the requirement that the state prisoner fairly present his claim to the state courts into a burden on the state courts to identify the federal nature of an inadequately presented claim. Contrary to the Ninth Circuit's reasoning, comity cannot be satisfied by imposing an obligation on the state courts to discover federal claims, rather than on state prisoners to present the claims.

The second problem with the Ninth Circuit's reasoning is that it fails to give proper respect to state procedural rules. Oregon appellate courts, like most state and federal appellate courts, require appellants to identify clearly the claims the appellant seeks to have the court address, including a clear identification of the legal basis for any claim. Again, the Ninth Circuit wrongly concluded that comity could be satisfied by a rule that disregards the state's procedural requirements. As

this Court has explained, fair presentation means nothing less than giving the state courts one clear opportunity to address a federal claim and that means presenting the claim in a manner that invites rather than forecloses state appellate court review.

But the Ninth Circuit is not alone in its struggle to implement the Court's requirements for fair presentation and proper exhaustion. After its discussion of the inadequacies in the Ninth Circuit rule, the State sets out a test that clarifies those requirements. The State's proposed test is clear and straightforward in its application and satisfies the interests of the States, state courts, state prisoners, and federal courts.

I. Although Reese never identified a federal basis for his claim of ineffective assistance of appellate counsel in the state appellate courts, the Ninth Circuit concluded that he had fairly presented the claim.

The Ninth Circuit accurately described this Court's holdings concerning the exhaustion requirement, but announced a rule that dramatically departs from the fair presentation requirement this Court has held is necessary for proper exhaustion. The Ninth Circuit devoted several pages to explaining the proper analysis that it believed should be applied in determining the exhaustion/procedural default question. App. to Pet. for Cert. 10-13. Its description correctly captured what this Court has stated:

> A state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). Exhaustion is required by statute. *See* 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement of § 2254, habeas petitioners must fairly presen[t] federal claims to

> the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' 'federal rights.'" *Lyons v. Crawford*, 232 F.3d 666, 668 (2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)).
>
> The exhaustion requirement has long been rooted in our commitment to federalism, *see Ex Parte Royall*, 117 U.S. 241, 251-52 (1886), and it goes hand in hand with our respect for state court processes. State courts, like federal courts, may enforce rights under the federal constitution. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990).

App. to Pet. for Cert. 10.

After acknowledging the need to show "respect for state court processes" as well as the state courts' ability to "enforce rights under the federal constitution," the Ninth Circuit then turned to a discussion of its opinion in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001). The court considered "whether the *Lyons* requirement for fair presentation is met by an explicit assertion of a federal law violation at the PCR court level alone, or whether *Lyons* requires some level of explicit assertion at later stages of the state appellate process." App. to Pet. for Cert. 12. The court concluded that the latter is compelled by the comity concerns that form the foundation for the exhaustion requirement:

> The federalism policies underlying exhaustion and the concerns that underlie *Lyons* argue persuasively that explicitness is necessary not merely at any one state court level, but instead

> at the highest state court that hears such claims. Following and clarifying *Lyons*, we hold that a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it. Accordingly, presenting a federal claim explicitly at the PCR court in itself is not sufficient for exhaustion.

App. to Pet. for Cert. 13. Again, the Ninth Circuit's articulation of the exhaustion requirement appears consistent with this Court's holdings and the State does not disagree with it.

But once the Ninth Circuit began applying these accepted principles, it almost immediately went astray. The court acknowledged that Reese did not cite federal authority in support of the ineffective assistance of appellate counsel claim in the Oregon Court of Appeals. However, because the PCR trial court had cited a federal case in its denial of this claim, the Ninth Circuit concluded that the Oregon Court of Appeals was alerted to the federal nature of the claim:

> So long as the Oregon Court of Appeals read the lower court's decision, it would have seen that Reese was raising a federal issue. Whatever else a state reviewing court might do, we are confident, as a ground of our decision, that the state reviewing court reads the decision it is reviewing before summarily affirming that decision.

App. to Pet. for Cert. 15.

Thus, the Ninth Circuit concluded that Reese properly exhausted his ineffective assistance of appellate counsel claim even though the Oregon Court of Appeals would not have been alerted to the federal nature of the claim through Reese's efforts but only through the state appellate court's own review

of the record, including the PCR trial court's memorandum opinion.

Reese made even less effort to present the claim in the Oregon Supreme Court than he did in the Oregon Court of Appeals. In his petition for review to the State's highest court, Reese did not attach the PCR trial court memorandum opinion or even refer to it. Nor did he cite the Sixth Amendment to the federal constitution or any case analyzing the federal right to effective counsel. Reese merely mentioned a complaint about his appellate counsel in three places. First, in his "Statement of Legal Question(s) Presented on Review," he asserted, "Petitioner pleads several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation." J.A. 47. Then, in his "Statement of reasons for reversal of Court of Appeals," Reese included, among other reasons, "Petitioner was subject to several errors with respect to this case, including * * * ineffective assistance of both trial court and appellate court counsel * * *." J.A. 47. Finally, in his "Statement of Facts" he stated, "Moreover, Petitioner alleges claims of error with respect to * * * inadequate appellate counsel." J.A. 48. He did not expand those bare statements by presenting either the factual or legal basis for his ineffective appellate counsel claim.

Nonetheless, the Ninth Circuit concluded that Reese properly had exhausted state-court remedies for his federal claim by fairly presenting it to the Oregon Supreme Court. The court assumed that, "simply by reading the PCR court decision, the Oregon Supreme Court would have been alerted that the claim for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law." App. to Pet. for Cert. 16-17.

The court acknowledged that there was a question "whether we should presume that the Oregon Supreme Court read the PCR court decision[.]" *Id.*, at 17. The court noted that an argument could be made that a state court exercising discretionary jurisdiction might decide a petition for review based solely on what is in the petition. *Id.* Yet it answered the question it had posed in the affirmative:

> We conclude that it is appropriate to presume that, when faced with a summary affirmance from the Oregon Court of Appeals, the Oregon Supreme Court would have read the PCR court's substantive decision. Any other conclusion would not do credit to the appellate review process. For whatever variations may be appropriate under discretionary state procedures, an appellate court cannot fairly review a decision without knowing its content.
>
> * * * [E]ven if review is discretionary, there is no way for the Oregon Supreme Court to exercise an informed discretion about accepting appeal unless it considers the content of the decision under review. A discretionary review is still to be a rational review.

App. to Pet. for Cert. 17-18.

Applying its rule to this case, the Ninth Circuit concluded that Reese had fairly presented a federal claim of ineffective assistance of appellate counsel to the two state appellate courts, even though he failed to identify the federal nature of his claim for either court.

II. The Ninth Circuit's rule improperly transforms the "fair presentation" requirement—where it is the state prisoner who must fairly present his claims to the state courts—into a "fair opportunity" requirement imposing a burden on the state appellate courts.

As described above, the Ninth Circuit accurately set out general exhaustion principles, but announced a rule that relieves a state prisoner of any obligation to present the federal nature of his claim beyond the state trial court. Instead, the Ninth Circuit imposed on the state appellate courts the obligation to search out potential federal claims in the record, whether or not the state prisoner properly asks the state court to address them. Under the Ninth Circuit's rule, as long as the state prisoner presented the federal claim to the state trial court and the state trial court addressed that claim, a passing reference to the claim in the State's appellate courts, without any indication of its federal nature, properly exhausts the claim. The Ninth Circuit's transformation of proper exhaustion from "fair presentation" to "fair opportunity" is without support in this Court's jurisprudence.

A state prisoner's fair presentation of federal claims to the state courts is a vital aspect of the dual system of state and federal courts. But comity requires more than simply passing through the state courts.

> If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall*, *supra*, 177 U.S. at 251, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Picard, *supra*, 404 U.S. at 275-276. Similarly, comity requires more than the mere presentation to the state courts of the facts supporting the federal claim without providing the state courts a real opportunity to consider the merits of the claim. *Id.*, at 276-277.

If it is insufficient for a state prisoner to properly exhaust state-court remedies for a federal claim by presenting only the factual basis of his claim to the state courts, surely it is insufficient to present neither the factual basis nor the federal source for that claim. The Court need look no further than *Picard* to reject the Ninth Circuit's specific holding in this case. Just as the federal appellate court erred in *Picard*, so, too, did the Ninth Circuit err in this case by finding Reese's ineffective assistance of appellate counsel claim properly exhausted simply because the state appellate courts could have found the missing parts of that claim by an independent review of the record. In neither case is the mere opportunity for the state court to apply controlling legal principles sufficient to satisfy the requirement that the state prisoner properly exhaust his claim by fairly presenting it to the state courts.

Admittedly, the state prisoner in *Picard* never presented his federal claim at *any* level of the state courts; the federal appellate court was the first to suggest the claim. *Picard*, *supra*, 404 U.S. at 272. Here, the parties agree that Reese presented a federal claim of ineffective assistance of appellate counsel to the state PCR trial court. However, the Court's cases since *Picard* have further clarified what a state prisoner

must do to properly exhaust a federal claim in each of the available state courts; the Ninth Circuit's transformation of the fair presentation requirement cannot be squared with that case law. For example, this Court has determined that a state prisoner does not properly exhaust a federal claim by presenting the factual basis of the claim and citing a case deciding a similar issue solely on state-law grounds. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (*per curiam*). Nor can federal habeas corpus courts examine the record to determine whether the federal ramifications of the state prisoner's claim in state court "were self-evident." Instead, they must consider whether the federal argument was presented to, or considered by, the state courts. *Id.*, at 7. The Court also noted its "doubt that a defendant's citation to a state-court decision predicated solely on state law ordinarily will be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in the cited case advanced a federal claim." *Id.*, at 7 n. 3.

Twenty-four years after the Court announced in *Picard* that a state prisoner must fairly present his federal claims in state court, the Court reiterated in even stronger terms the responsibility of a state prisoner to present his federal claims first in state court.

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-366 (1995) (*per curiam*).[11] The dissent criticized the majority for "tighten[ing] the pleading screws by adding the requirement that the state courts 'must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.'" *Id.*, at 368 (Stevens, J. dissenting). Yet that is precisely what the majority determined was required for presentation to be "fair" and for state courts to have a genuine opportunity to address the state prisoner's federal claims.

Thus, the Court's case law has established that the state prisoner bears the responsibility to fairly present to the state courts any federal claim he wants to assert in federal habeas. To satisfy that responsibility, the state prisoner must present the factual allegations that support his federal claim to the state courts, but those factual allegations alone are not sufficient to raise the claim. *Picard v. Connor, supra; Anderson v. Harless, supra; see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (reaffirming the need for both the factual basis and underlying legal theory); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992) (exhaustion must be serious and meaningful, and must include "full factual development"). The state prisoner must identify plainly the federal source of his claim. *Duncan, supra*. It is not enough for the state prisoner to present the state courts with a claim that is substantially similar

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[11] The Court found the failure to exhaust "especially pronounced in that respondent did specifically raise a due process objection before the state court based on a different claim[.]" *Duncan, supra*, 513 U.S. at 366. Similarly, here Reese properly exhausted in state court his claim that he received ineffective assistance of *trial* counsel in his third sentencing by specifically referring to his "5th, 6th, and 14th amendment rights." *See* J.A. 37-38, 48. As in *Duncan*, Reese's citation to federal authority in connection with his ineffective trial counsel claim makes his failure with regard to the appellate counsel claim "especially pronounced."

to, but not the same as, the federal claim he wants to raise in federal habeas; nor is it enough for the state prisoner to present the state courts with the state counterpart of the federal claim. *Harless*, *supra*.

Despite this Court's consistent emphasis on the state prisoner's obligation to fairly present federal claims in the state courts, the Ninth Circuit improperly shifted from a "fair presentation" requirement resting squarely on the state prisoner to a "fair opportunity" requirement resting instead on the state courts. The court appears to have justified this shift, in part, by its presumption of what a state appellate court will—or should—do on review of a trial court decision. But as this Court repeatedly has held, that type of presumption is wrong for two reasons. First, in Oregon, it is an appellant's obligation to identify what claim he is asking the appellate court to review. Second, federal courts must look to state procedures to determine whether state appellate courts would consider a federal issue as properly presented to them.

III. The Ninth Circuit's rule fails to give proper respect to the role of state procedural rules in the exhaustion analysis.

The Ninth Circuit did not cite any case to support its conclusion that it could presume that the state appellate courts looked back through the layers of Reese's PCR case and used the trial court's opinion to complete an otherwise incomplete claim of error. Although the court did not cite *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the presumption the court applied sounds similar to the presumption addressed in *Ylst*. There, the Court discussed the presumption that, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." 501 U.S. at 803. The Court also noted, "The maxim is that silence implies consent, not the opposite—and courts generally be-

have accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Id.*, at 804.

As in *Ylst*, the Ninth Circuit in this case looked back through two unexplained orders from the Oregon Court of Appeals and the Oregon Supreme Court to the last reasoned state judgment—from the post-conviction trial court—and presumed that the appellate courts adopted the reasoning of the trial court. However, the presumption discussed in *Ylst* applies only where the silent state court was presented with the particular federal claim. *See id.*, at 801. That is, in *Ylst*, the state prisoner actually asserted his federal claim in the state appellate courts. If the Ninth Circuit was relying on the presumption articulated in *Ylst*, it could not apply here—a court's silence in response to a brief or petition that does not fairly present a claim implies nothing about the court's reasoning on that claim.

Instead of relying on the *Ylst* presumption, it is equally likely that the Ninth Circuit relied simply on its belief about what the Oregon appellate courts did in resolving Reese's PCR appeal. To the extent that the Ninth Circuit based its ruling on that belief, its reasoning is not supported by the State's procedural rules or case law. And, to the extent that the Ninth Circuit ignored those state procedural rules, its reasoning is contrary to this Court's case law.

A. Oregon's appellate courts do not, as a matter of course, review a trial court's memorandum opinion to complete inadequately presented appellate claims.

Contrary to the Ninth Circuit's presumptions, it is clear that neither the Oregon Court of Appeals nor the Oregon Supreme Court would have used the PCR trial court's memorandum opinion to supplement the limited material Reese pre-

sented in his brief or petition. Oregon's appellate procedures are similar to those of other states as well as the federal appellate courts and this Court. For any challenge brought to state appellate courts, the appellant must meet certain procedural requirements before the appellate court will address his claims.

In the Oregon Court of Appeals, the appellant must assign a claim as error in the opening brief on appeal, must satisfy the court's preservation-of-error requirements, and must provide the argument in support of the claimed error. Or. R. App. P. 5.45; App-6 to App-7. Contrary to the Ninth Circuit's presumptions, the Oregon Court of Appeals will not review a claim that does not satisfy each of these requirements, even if the court could have located the necessary information by its own review of the record. *See Lichau v. Baldwin*, 166 Or. App. 411, 423, 999 P.2d 1207, 1214 (2000) (court refused to consider claims of error raised by state prisoner in post-conviction appeal because he did not brief the assignments of error, but "invites us to comb his post-conviction trial memorandum for support" and the rules require the appellant to present and develop appropriate appellate arguments);[12] *see also*

[12] The Oregon Supreme Court reversed the Oregon Court of Appeals on a different basis. *Lichau v. Baldwin*, 333 Or. 350, 39 P.3d 851 (2002). However, the court noted without criticism the intermediate appellate court's refusal to consider the improperly presented claims:

> [B]ecause we conclude that petitioner is entitled to a new trial as a result of his lawyer's constitutionally inadequate assistance, we need not address petitioner's cross-assignment of error with regard to the post-conviction court's dismissal of his remaining claims of trial court error, prosecutorial misconduct, and other issues. In any event, petitioner did not properly develop or present those claims in his briefs in this court or in the Court of Appeals.

Id., 333 Or. at 365 n. 3, 39 P.3d at 800 n. 3.

Reynolds v. Lampert, 170 Or. App. 780, 789, 13 P.3d 1038, 1043 (2000) (court refused to consider state prisoner's post-conviction claim because he failed to comply with the procedural requirements for a cross-appeal); *Garcez v. Freightliner Corporation*, 188 Or. App. 397, 404, ___ P.3d ___ (2003) (court refused to consider a claim because "(1) that ruling is not fairly encompassed within plaintiff's assignments of error as framed in his opening brief, and (2) plaintiff's arguments pertaining to those claims are not adequately developed on appeal.").[13]

[13] Oregon law requires the PCR trial court to "state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. § 138.640; App-4. In addition, the law states that a summary affirmance, such as the Oregon Court of Appeals' order in the underlying PCR case here, "constitutes a decision on the merits of the appeal." Or. Rev. Stat. § 138.660; App-5. In his response to the State's petition for writ of certiorari, Reese took the State to task for failing to mention these and related statutes. Brief in Opposition 13-16. Reese asserted that these statutes somehow alter the normal practice in the Oregon Court of Appeals. Reese is wrong in that assertion.

Neither the statutory requirement for the trial court to state the grounds presented nor the summary affirmance statute alter the state appellate rules of procedure and the requirement that the appellant properly present an issue before the Oregon Court of Appeals will consider it. *See Bennett v. Maass*, 131 Or. App. 557, 559-560, 886 P.2d 1043, 1044 (1994), *rev denied* 321 Or. 47, 892 P.2d 1024 (1995) (dismissing post-conviction appeal pursuant to Or. Rev. Stat. § 138.660 where the appellant disagreed with the trial court's findings but did not provide an argument or explanation in

Similarly, a petition for review to the Oregon Supreme Court must meet the court's procedural rules before that court will consider a claim. The petition for review must contain a concise statement of the legal question presented on review, reasons for reversing the decision of the intermediate appellate court, a short statement of the relevant facts, and a brief argument. Or. R. App. P. 9.05(4); App-12. The court will not consider a claim presented for the first time in a petition for review, but will exercise its discretionary review to consider only "questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court." Or. R. App. P. 9.20(2); App-13.

Thus, Oregon appellate courts place the burden on the party seeking review to identify the issues the party wants the court to address.[14] In this decisive respect, Oregon's appellate procedure is similar to federal procedure: before the federal appellate court will consider a claim, the appellant must satisfy certain procedural requirements and must present the court with the factual and legal basis of the claim. The federal appellant must set forth the claims, arguments, and citations

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support of his general assertion). Summarily affirming a judgment does not mean that an appellate court reached the merits of a claim that the appellant never properly raised.

[14] The Oregon Supreme Court recently reiterated its expectation that appellate counsel will winnow the claims on appeal: "Courts depend on counsel to examine the record, study the applicable law, and analyze the potentially meritorious claims that should be advanced on appeal. The exercise of professional skill and judgment often requires a lawyer to pick and choose among arguments or theories * * *. Effective appellate advocacy requires counsel to make those choices." *Pratt v. Armenakis*, 335 Or. 35, 40, 56 P.3d 920, 922 (2002). This expectation would have no effect if the court were required to independently search the record for the claims the appellant chose not to pursue.

to the authorities and parts of the record on which the appellant relies. Fed. R. App. P. 28(a)(9)(A). Federal appellate courts ordinarily will not consider matters on appeal that are not "specifically and distinctly" raised and argued in the opening brief, with the exception of certain jurisdictional issues. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim[.]"). Moreover, federal appellate courts will consider issues abandoned if the appellant raises them but does not support them by argument. *Wilkins v. United States*, 279 F.3d 782, 785-786 (9th Cir. 2002); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (court refused to address issues where the appellant's "opening brief provided only cursory mention, with virtually no discussion" of the issues).

As with the federal circuit courts of appeal, this Court will, with rare exceptions, refuse to consider claims that were not raised or addressed in the lower courts, especially in review of state court cases. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (Court refused to address issue that was not raised or briefed in the state courts); *Yee v. Escondido*, 503 U.S. 519, 533 (1992) (Court refused to consider one claim because it was not raised or addressed in the state courts and refused to consider a second claim because it was "not fairly included in the question on which we granted certiorari."). Thus, the Ninth Circuit erred in its understanding of appellate procedure by presuming that the Oregon appellate courts would have done what federal appellate courts will not do—fill in the factual and legal components that were not asserted as part of an appellate claim. More importantly, the Ninth Circuit erred in concluding that, even if the State's procedural requirements prevented the State court from identifying and

addressing Reese's federal claim, that procedural bar had no bearing on the exhaustion issue.

B. In an analysis that finds no support in this Court's federal habeas corpus jurisprudence, the Ninth Circuit disregarded the effect of the State's appellate procedural requirements, yet nonetheless concluded that its analysis satisfied comity concerns.

The Ninth Circuit based its analysis, in part, on its incorrect presumption of what the state appellate courts did, but it made clear that its analysis would have been the same even if its presumption about how the state appellate courts operated was wrong. The Ninth Circuit concluded that its analysis—and its willingness to disregard state procedural requirements for presentation of claims to the state appellate courts—satisfied the comity concerns that underlie the exhaustion requirement:

> Comity requires only that we not rule if the state court has not had the opportunity first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.
>
> Here, we conclude that the Oregon Supreme Court had that opportunity. A state supreme court certainly has the opportunity to read a petition for review and the lower court decision claimed to be in error before deciding whether to grant discretionary review. It is in this sense that we presume the Oregon Supreme Court read Reese's PCR court opinion. But assuming arguendo that the Oregon Supreme Court chooses not to read lower court opinions when deciding whether to grant review, it would not control our exhaustion analysis. For in that assumed case, that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue.

App. to Pet. for Cert. 18-19 (emphasis added).

The Ninth Circuit's holding is directly contrary to what this Court has determined is required for fair presentation. The Court has emphasized the state prisoner's obligation to present a federal claim in a procedural context in which the merits of the claim will be considered by the state court. *Castille v. Peoples*, 489 U.S. 346, 349-351 (1989). Thus, for example, the Court rejected the contention that "submission of a new claim to a State's highest court on discretionary review constitutes a fair presentation" because the state court would not consider a claim raised in that manner. *Id.*, at 351.

Again, in *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court emphasized the need to consider state procedural rules. "We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. * * * The Court has long understood the vital interest served by federal procedural rules, even when they serve to bar federal review of constitutional claims. * * * No less respect should be given to state rules of procedure." *Id.*, at 751.[15] The Court has made it clear that exhaustion requires

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[15] An additional point from *Coleman* is worth mention. In addressing the independent-and-adequate-state-ground doctrine, the Court noted that that doctrine, too, is grounded in concerns of comity and federalism:

> Without the rule, a federal district court would be able to do in habeas what the Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and

that the state prisoner present the federal claim through one complete cycle of state-court review and that he satisfy the procedural requirements at each point in the process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848-849 (1999) (comity requires presentation to the State's highest appellate courts, even where that review is discretionary; the state prisoner must "use the State's established appellate review procedures before he presents his claims to a federal court").

As the Court has emphasized repeatedly, the inquiry in cases such as this one is whether the state prisoner *properly exhausted* his federal claim in the state courts by *fairly presenting* the claim to the state courts. Fair presentation requires compliance with state procedural rules and the Ninth Circuit was wrong to conclude that comity and fair presentation could be satisfied by presenting a claim in a manner that would foreclose rather than invite state appellate court review.

> adequate state grounds an end run around the limits of the Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

501 U.S. at 730-731. The Ninth Circuit's rule in this case would allow the same type of end run. Because the Court will not review a claim that was not properly presented to the state's highest court, it could not have reviewed Reese's ineffective assistance of appellate counsel claim if Reese had sought this Court's direct review of the Oregon Supreme Court's denial of the petition for review in the PCR proceeding. The same concern for comity that led the Court in *Coleman* to reject the rule that permitted a state prisoner to skip the state's highest court should lead it to reject the Ninth Circuit's rule in this case.

IV. The Court should use this case as an opportunity to clarify its test for fair presentation of federal claims to state courts.

The Ninth Circuit has struggled over the Court's requirements for fair presentation and proper exhaustion. In his brief in opposition to the petition for writ of certiorari, Reese pointed to several Ninth Circuit cases in which that court applied the exhaustion requirement more rigorously than it did in this case. Brief in Opposition 17-20. Comparing those decisions with the one in this case does suggest that the Ninth Circuit has been inconsistent in its application of the exhaustion requirement. Moreover, the Ninth Circuit is not alone in finding it difficult to articulate and consistently apply a clear rule that satisfies this Court's precedent, as the State discussed in its petition for writ of certiorari.

Judicial efforts to explain the fair presentation requirement have led to colorful descriptions of what is and is not adequate, but little in the way of an easily and consistently applied test. *See Petrucelli v. Combe*, 735 F.2d 684, 689 (2nd Cir. 1984) ("Federal judges will not presume that state judges are clairvoyant"); *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994) (a petitioner must make more than a "perfunctory jaunt through the state court system"); *Nadworny v. Fair*, 872 F.2d 1093, 1101 (1st Cir. 1989) ("an isolated federal-law bloom in a garden thick with state-law references" will not suffice to put a reasonable state jurist on notice of a federal claim); *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988) ("The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick."). Or, as Judge Nelson put it in his dissent in this case, "Judges are not like pigs hunting for truffles buried in briefs. At least federal appellate judges are not, according to our precedent. Yet the majority would hold

state supreme court justices to a different standard—requiring them to root through the record for rare truffles of legal support that may complete an incompletely raised claim * * *." App. to Pet. for Cert. 20 (internal quotation marks and citation omitted).

The inconsistent tests applied by the circuits appear to spring, in part, from language this Court used in *Picard*. Although the holding of *Picard* seems clear enough, litigants and some federal courts have seized on the Court's caution that a state prisoner need not cite "book and verse on the federal constitution" to properly exhaust a federal claim in state court. *Picard, supra,* 404 U.S. at 278 (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)). But since *Picard*, the Court has clarified that statement and has identified the concerns that underlie the exhaustion requirement. Nonetheless, the federal appellate courts have not modified their various approaches in response to those more recent decisions. Many, like the Ninth Circuit in this case, have adopted a view of comity that does not give proper consideration to the States' interests in having a first fair opportunity to consider the federal claims of state prisoners.

The States, state courts, state prisoners, and federal courts each have an interest in a clearly defined rule of exhaustion and, for the most part, those interests are not in conflict. For the States and the state courts, the primary interest is the comity concern that this court long has recognized as the foundation of the exhaustion requirement: state courts should have a full and fair opportunity to resolve federal constitutional claims before state prisoners present those claims to the federal courts. *O'Sullivan, supra,* 526 U.S. at 845. As the Court has noted, the cost of federal review falls heavily on the States:

> [M]ost of the price paid for federal review of state prisoner claims is paid by the State. When

> a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction.

Coleman, supra at 738-739. There also is a significant social cost of concern to the States, as the Court recognized in *Engle v. Isaac*, 456 U.S. 107, 127-128 (1982):

> We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

In addition, States have a strong interest in seeing that there is finality in criminal convictions.

For state prisoners, the primary interest is in having their meritorious federal claims speedily reviewed and resolved. *Rose v. Lundy,* 455 U.S. 509, 520 (1982). Those interests also are best served by a clear recognition that state courts are fully equipped to address federal issues and an equally clear recognition that state courts will vindicate meritorious federal claims sooner than federal courts possibly can reach them. This Court has noted also that a rigorously enforced exhaustion rule gives state courts even greater familiarity with federal constitutional issues and adds to their ability to resolve

these claims promptly and properly. *Rose, supra*, 455 U.S. at 518-519. Thus, state prisoners will obtain appellate review sooner by presenting those federal claims clearly in the state courts and, if the claims are meritorious, will obtain relief sooner. As the Court stated in adopting a complete exhaustion rule, an explicit rule provides state prisoners with "simple and clear instruction * * *: before you bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement." *Rose, supra*, 455 U.S. at 520. Moreover, the Court concluded that the more stringent rule it adopted—requiring complete exhaustion—would neither "complicate and delay" the resolution of habeas petitions nor "trap the unwary *pro se* prisoner." *Id.*, at 520 (quoting from dissenting and concurring opinions).[16]

The benefits of a clear exhaustion rule for federal courts are almost as great. A rule that emphasizes the need for proper presentation of issues in the state courts reduces the claims the federal courts must address, makes it easier to identify claims that properly are before the federal court, and provides a more complete record when it is necessary to address a federal habeas claim. In the 12-month period ending March 31, 2002, state prisoners filed almost 20,000 habeas cases in the federal

[16] Justice Blackmun, in his concurrence, expressed concern that the requirement that mixed petitions (containing both exhausted and unexhausted claims) be returned to state courts would be "more destructive than solicitous of federal-state comity" because state courts would face an increased number of patently frivolous claims. *Id.*, at 525. Congress addressed that concern in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) by providing federal courts the authority to address and deny unexhausted claims rather than send these claims back to the state courts for exhaustion. 28 U.S.C. § 2254(b)(2).

district courts and sought appellate review of approximately 7,000 cases.[17] While not every case raises questions of exhaustion, many—if not most—do. As Justice Stevens noted in his dissent in *Anderson, supra*, 459 U.S. at 8, "Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus." A fair presentation rule that requires a plain statement of the factual grounds and federal legal source of each claim obviously will reduce the time spent litigating and deciding questions of exhaustion and procedural default. In addition, a rule that focuses on the state prisoner's brief in the state courts furthers "the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it." *Harris v. Reed*, 489 U.S. 255, 265 (1989). Finally, for those issues that are properly exhausted and then presented to the federal courts, the federal courts will have a more complete record to review.[18]

The States, state courts, state prisoners, and federal courts each would benefit if this Court used this case as an opportunity to clarify the requirements for fair presentation that will satisfy the interests described above. The State proposes the following as a clear and straightforward description of what the Court previously has suggested is required:

> To fairly present a federal claim in state court, a state prisoner must

[17] Federal Judicial Caseload Statistics for March 31, 2002; published by the Administrative Office of the United States Courts.

[18] When a record has been developed in state court, federal courts must defer to a state court's factual findings. 28 U.S.C. § 2254 (e)(1) creates a presumption that factual determinations by state courts are correct unless the state prisoner rebuts that presumption by clear and convincing evidence.

(1) present sufficient facts to support the claim; and

(2) identify clearly the federal legal source of the claim by

(a) citing the federal constitutional provision(s) relied on;[19] or

(b) citing at least one reported case that expressly has decided the claim solely on a federal basis; or

(c) expressly identifying a claim that necessarily must be based on a federal right.

Consistent with this Court's precedents, the test applies at each level of available state court review. Under the test, the state prisoner also must comply with the mandatory state rules of appellate procedure.

Application of the proposed test should be guided by the overriding question: Did the state prisoner fairly present the federal claim to the state courts? Thus, under section (2)(a) of the proposed test, if a broad federal provision is cited—one that could serve as the basis for multiple distinct federal claims—the state prisoner must alert the state court to the precise federal claim either through the facts presented or the argument. For example, simply asserting a "Sixth Amendment claim" is insufficient to identify for the state court the precise federal claim raised, because the constitutional provision encompasses rights to counsel, confrontation, and compulsory process. The state prisoner may narrow that broad reference by the facts presented or by the discussion of the claim; if the facts or discussion do not clearly identify the precise federal claim, a reference to a broad federal constitutional provision would be insufficient to satisfy the test.

[19] There may be some claims based on alleged violations of federal statutes or treaties, in which case the state prisoner would need to identify the federal source of law. Nearly all federal habeas claims, however, are based on alleged violations of rights guaranteed by the federal constitution.

Under section (2)(b) of the State's proposed test, if a case is used as the basis for presenting the state court with the federal authority, the case cited must be one that will put the state court on notice of the specific federal claim the state prisoner is raising. If it is not a decision from this Court, the case "must play a prominent part in [the state prisoner's] state court argument"[20] and cannot be buried in a string citation of several cases that address the issue on state grounds alone or on both state and federal grounds.

Under section (2)(c) of the proposed test, a state prisoner could identify a federal claim through an accepted short-hand reference without expressly identifying the federal constitutional provision, such as "my federal right to effective counsel." Similarly, some claims may necessarily be federal where there is no state counterpart. For example, the Oregon Constitution does not contain a due process clause;[21] a reference to a "due process violation" in Oregon courts necessarily alerts the state courts that a federal claim is being presented.

By way of example, consider how a state prisoner could satisfy the state's proposed test and fairly present an ineffective assistance of appellate counsel claim. At each level of available state review, the state prisoner would have to:

[20] *Dougan v. Ponte*, 727 F.2d 199, 202 (1st Cir. 1984).

[21] *See, e.g., State v. Miller*, 327 Or. 622, 635 n. 10, 969 P.2d 1006, 1013 n. 10 (1998) ("the Oregon Constitution contains no due process clause").

(1) identify the facts that establish what counsel did or failed to do; and

(2) alert the state court to the federal legal source of the claim by

(a) citing to the Sixth Amendment ("my appellate attorney violated my right to effective counsel under the Sixth Amendment"); or

(b) citing to a reported case ("my appellate attorney violated my right under *Strickland* to effective counsel"); or

(c) expressly identifying the federal source of the claim ("my appellate attorney violated my federal right to effective counsel").

With respect to Reese's federal claim of ineffective appellate counsel, Reese failed to satisfy the State's proposed test either in the Oregon Court of Appeals or the Oregon Supreme Court. In the Oregon Court of Appeals, Reese failed to present the facts necessary to support his ineffective appellate counsel claim because he never identified the specific issues he believed appellate counsel should have raised in the PCR appeal. All Reese presented to the intermediate appellate court was a claim labeled "ineffective assistance of appellate counsel" and a tangled description of Reese's complaint. The closest Reese came to presenting the issue he later sought to raised in the federal habeas corpus proceeding was his statement that "Mr. Jesse Wm. Barton did fail to raise issues on appeal."[22] J.A. 32. This description is inadequate to inform

[22] The State and the Ninth Circuit have treated the problem in this case primarily as a question whether, in state court, Reese identified his ineffective appellate counsel claim as a federal claim. Arguably, the problem is not simply that Reese presented a claim but failed to identify a federal source for the legal right asserted.

the state appellate court of any specific claim of ineffective assistance of counsel. In addition, Reese did not cite the Sixth Amendment, did not cite *Strickland v. Washington*, 466 U.S. 668 (1984), or any other case analyzing the federal right to effective counsel, and did not state that his appellate counsel's performance violated his federal right to counsel.[23]

Similarly, in the Oregon Supreme Court, Reese alerted the court to neither the necessary facts nor the federal legal source of this claim. Again, Reese stated that one issue presented was the effectiveness of appellate counsel, but he failed to identify the facts necessary to explain that claim. Nor did he cite any constitutional provision or legal authority of any kind relating to that claim. Looking only at what Reese submitted to the state appellate courts, there is no basis to conclude that he gave the state courts a fair opportunity to address the claim he later sought to raise in the federal courts.

The State's proposed test readily demonstrates Reese's failure to fairly present a federal claim to the state courts. More generally, it satisfies the interests of the States, state courts, state prisoners, and federal courts by promoting comity, finality, speedy resolution of meritorious federal claims, and judicial efficiency, while not placing an onerous burden

Rather, it could be argued that Reese failed to present adequately *any* ineffective appellate counsel claim. In that case, *O'Sullivan* would control the result because Reese simply failed to present his claim at each available stage of state-court appellate review. 526 U.S at 848-849.

[23] Because Article I, section 11, of Oregon's constitution guarantees the right to counsel in all criminal prosecutions, the mere mention of the "right to counsel" would not alert the state appellate courts that Reese was asking them to address a claim under the federal constitution.

on the state prisoner. [24] The test focuses on what the state prisoner must do to inform the state court that the prisoner is asking the court to address a federal claim; contrary to the Ninth Circuit's ruling in this case, comity is best served by nothing less. The test focuses solely on what the state prisoner files in the state court; it does not require or permit the federal habeas court to search outside of the state prisoner's state-court brief to identify the federal claim. The proposed test thereby minimizes litigation over whether the state prisoner satisfied the exhaustion requirement.

The test requires the state prisoner to give the state courts one clear and fair opportunity to address and resolve any federal claim, yet it gives the state prisoner several ways of identifying the federal claim for the state courts. In short, it promotes what the Court has stated is the purpose of exhaustion: "not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Keeney, supra*, 504 U.S. at 10.

[24] The State's proposed test is similar to the Court's requirement for federal claims presented to it for review under 28 U.S.C. § 1257. The Court's fair presentation rule for challenges to state court decisions serves the same important interests of comity and judicial efficiency that underlie the exhaustion requirement in federal habeas. *Webb v. Webb*, 451 U.S. 493, 500 (1981). The Court requires a petitioner to demonstrate that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Id.*, at 501.

The Court has described a petitioner's burden as involving the need to demonstrate that the petitioner presented the particular claim at issue with "fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Although the Court has not insisted on "inflexible specificity" for how litigants must identify the federal nature of their claim in state court, "[a]t a minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the claim at the time and in the manner required by the state law." *Webb, supra*, 451 U.S. at 501 (emphasis in original).

Under the State's proposed test, the state prisoner's duty is clear. He must fairly present his claim in state court by alerting that court to the federal nature of the claim through some unmistakable reference. Elimination of guesswork satisfies the realities of practice in overburdened state appellate courts, meets the requirements of state appellate procedure, and serves the various interests of the courts and the parties. It may serve also to reduce the frequency with which this Court is asked to deal with the exhaustion question. *See Castille, supra*, 489 U.S. at 349-350 (1989) ("Today we address again what has become a familiar inquiry: '*To what extent* must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?'") (emphasis in original; citation omitted). The Court should reject the Ninth Circuit's approach and, instead, take the opportunity to announce a fair and easily applied test for proper exhaustion.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. KLAPSTEIN
ROBERT B. ROCKLIN
Assistant Attorneys General
Counsel for Petitioner

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APPENDIX

Or. Rev. Stat. § 138.530 When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected.

(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state.

Or. Rev. Stat. § 138.540 Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies.

(1) Except as otherwise provided in ORS 138.510 to 138.680, a petition pursuant to ORS 138.510 to 138.680 shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings upon which it is based. The remedy created by ORS 138.510 to 138.680 does not replace or supersede the motion for new trial, the motion in arrest of judgment or direct appellate review of the sentence or conviction, and a petition for relief under ORS 138.510 to 138.680 shall not be filed while such motions or appellate review remain available. With the exception of habeas corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

(2) When a person restrained by virtue of a judgment upon a conviction of crime asserts the illegality of the restraint upon grounds other than the unlawfulness of such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available under ORS 138.510 to 138.680 but shall be sought by habeas corpus or other remedies, if any, as otherwise provided by law. As used in this subsection, such other grounds include but are not limited to unlawful revocation of parole or conditional pardon or completed service of the sentence imposed.

Or. Rev. Stat. § 138.550 Availability of relief as affected by prior judicial proceedings.

The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in the petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.

(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended

petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground could reasonably have been asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in the conviction and sentence of the petitioner.

Or. Rev. Stat. § 138.640 Judgment.

After deciding the issues raised in the proceeding, the court shall deny the petition or enter an order granting the appropriate relief. The court may also make orders as provided in ORS 138.520. The order making final disposition of the petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a

final judgment for purposes of appellate review and for purposes of res judicata.

Or. Rev. Stat. § 138.650 Appeal.

Either the petitioner or the defendant may appeal to the Court of Appeals within 30 days after the entry of final judgment on a petition pursuant to ORS 138.510 to 138.680. The manner of taking the appeal and the scope of review by the Court of Appeals and the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that:

(1) The trial court may provide that the transcript contain only such evidence as may be material to the decision of the appeal; and

(2) With respect to ORS 138.081 (1), if petitioner appeals, petitioner shall cause the notice of appeal to be served on the attorney for the defendant, and, if defendant appeals, defendant shall cause the notice of appeal to be served on the attorney for petitioner or, if petitioner has no attorney of record, on petitioner.

Or. Rev. Stat. § 138.660 Summary affirmation of judgment; dismissal of appeal.

In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Court of Appeals on its own motion or on motion of respondent may summarily affirm, after submission of the appellant's brief and without submission of the respondent's brief, the judgment on appeal without oral argument if it finds that no substantial question of law is presented by the appeal. Notwithstanding ORS 2.570, the Chief Judge of the Court of Appeals may deny or, if the petitioner does not oppose the motion,

grant a respondent's motion for summary affirmation. A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal.

Or. R. App. P. 5.45 Assignments of Error and Argument.

(1) A question or issue to be decided on appeal shall be raised in the form of an assignment of error, as prescribed in this rule. Assignments of error are required in all opening briefs of appellants and cross-appellants. No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may consider an error of law apparent on the face of the record.

(2) Each assignment of error shall be separately stated under a numbered heading. The arrangement and form of assignments of error, together with reference to pages of the record, should conform to the illustrations in Appendix J.

(3) Each assignment of error shall identify precisely the legal, procedural, factual, or other ruling that is being challenged.

(4)(a) Each assignment of error shall demonstrate that the question or issue presented by the assignment of error timely and properly was raised and preserved in the lower court. Under the subheading "Preservation of Error":

(i) Each assignment of error, as appropriate, must specify the stage in the proceedings when the question or issue presented by the assignment of error was raised in the lower court, the method or manner of raising it, and the way in which it was resolved or passed on by the lower court.

(ii) Each assignment of error must set out pertinent quotations of the record where the question or issue was raised and

the challenged ruling was made, together with reference to the pages of the transcript or other portions of the record quoted or to the excerpt of record if the material quoted is set out in the excerpt of record. When the portions of the record relied on under this subparagraph are lengthy, they shall be included in the excerpt of record instead of the body of the brief.

(b) An assignment of error for a claimed error apparent on the face of the record shall comply with the requirements for assignments of error generally by identifying the precise ruling, specifying the state of the proceedings when the ruling was made, and setting forth pertinent quotations of the record where the challenged ruling was made.

(c) The court may decline to consider any assignment of error that requires the court to search the record to find the error or to determine if the error properly was raised and preserved.

(5) Under the subheading "Standard of Review," each assignment of error shall identify the applicable standard or standards of review, supported by citation to the statute, case law, or other legal authority for each standard of review.

(6) Each assignment of error shall be followed by the argument. If several assignments of error present essentially the same legal question, the argument in support of them may be combined so far as practicable. The argument in support of a claimed error apparent on the face of the record shall demonstrate that the error is of the kind that may be addressed by the court without the error having been preserved in the record.

Or. R. App. P. 5.90 "*Balfour*" Briefs filed by court-appointed counsel.

(1) If counsel appointed by the court to represent an indigent defendant in a criminal case on direct appeal has thor-

oughly reviewed the record, has discussed the case with trial counsel and the client, and has determined that the case does not raise any arguably meritorious issues, counsel shall file a brief with two sections:

(a) Section A of the brief shall contain:

(i) A statement of the case, including a statement of the facts of the case. If the brief contains a Section B with one or more claims of error asserted by the client, the statement of facts shall include facts sufficient to put the claim or claims of error in context.

(ii) A description of any demurrer or significant motion filed in the case, including, but not limited to, a motion to dismiss, a motion to suppress and a motion *in limine*, and the trial court's disposition of the demurrer or motion.

(iii) A statement that the case is being submitted pursuant to this rule, that counsel has thoroughly reviewed the record and discussed the case with trial counsel and the client, and that counsel has not identified any arguably meritorious issue on appeal. If the brief does not contain a Section B, counsel also shall state that counsel contacted the client, gave the client reasonable opportunity to identify a claim or claims of error, and that the client did not identify any claim of error for inclusion in the brief.

(iv) Counsel's signature.

(b)(i) Section B of the brief is the client's product and may contain any claim of error that the client wishes to assert. The client shall attempt to state the claim and any argument in support of the claim as nearly as practicable in proper appellate brief form. The last page of Section B of the brief shall contain the name and signature of the client.

(ii) Counsel's obligation with respect to Section B of the brief shall be limited to correcting obvious typographical er-

rors, preparing copies of the brief, serving the appropriate parties, and filing the original brief and the appropriate number of copies with the court.

[Prior to the 2003 rule amendments, this section provided: "(b) Section B of the brief shall contain any claim of error requested by the client and shall be signed by the client. Section B shall attempt to state the claim and any argument in support of the claim as nearly as practicable in the manner that the client seeks, in proper appellate form."]

(2) A case in which appellant's brief is prepared and filed under this rule shall be submitted without oral argument, unless otherwise ordered by the court.

(3) On reviewing the record and the briefs filed by the parties, if the court identifies one or more arguably meritorious issues in the case, the court shall notify appellant's counsel of the issue or issues so identified. Appellant's counsel shall have 28 days from the date of the court's notice to file a supplemental opening brief addressing those issues. In addition to addressing the issue or issues identified by the court, counsel may address any other arguably meritorious issue counsel has identified. Respondent shall have 28 days after appellant files a supplemental opening brief to file a response or supplemental response brief addressing the issues raised in the supplemental opening brief.

(4) In a case other than a criminal case on direct appeal, court-appointed counsel who determines that there are no meritorious issues on appeal may submit a brief under this rule, in which case the matter will be submitted without oral argument, unless otherwise ordered by the court.

(5) In any case in which the appellant is represented by court-appointed counsel on appeal and counsel filed a brief in the Court of Appeals under subsection (1) of this rule, counsel may submit a petition for review that contains a Section A

that complies with Rule 9.05(2), (5), and (7)(g), and a Section B that complies with paragraph (1)(b) of this rule.

Or. R. App. P. 9.05 Petition for Supreme Court review of Court of Appeals decision.

(1) Reviewable Decisions

As used in this rule, "decision" means an opinion, per curiam opinion, or memorandum opinion of the Court of Appeals, including a decision affirming from the bench or affirming without opinion, and an order ruling on a motion, own motion matter, petition for attorney fees, or statement of costs and disbursements.

(2) Time for Filing and for Submitting Petition for Review

(a) Any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days from the date of the Court of Appeals' decision. The Supreme Court may grant an extension of time to file a petition for review.

(b) (i) If a timely petition for reconsideration of a decision of the Court of Appeals is filed by any party, the time for filing a petition for review concerning that decision for all parties shall not begin to run until the Court of Appeals issues its order deciding the petition for reconsideration.

(ii) If a petition for review is filed during the time in which a petition for reconsideration in the Court of Appeals may be filed, the petition for review will not be submitted to the Supreme Court until the time for filing a petition for reconsideration expires.

(iii) If a petition for review is filed after the filing of a timely petition for reconsideration, the petition for review will

not be submitted to the Supreme Court until the Court of Appeals issues its order deciding the petition for reconsideration.

(c) (i) If the Administrator has issued the appellate judgment based on the Court of Appeals' disposition of a case, within a reasonable time thereafter, a party may move to reinstate the appeal for the purpose of seeking review. The party shall file in the Supreme Court a motion to recall the appellate judgment and to establish a new due date for the petition for review.

(ii) If the party requests immediate recall of the appellate judgment, the motion should identify the circumstances justifying that relief. Otherwise, the court may postpone the decision whether to recall the appellate judgment until the court decides whether to allow review.

(iii) A party filing a motion to recall the appellate judgment in a criminal case, in addition to serving all other parties to the appeal, shall serve a copy of the motion on the district attorney.

(3) Form and Service of Petition for Review

(a) The petition shall be in the form of a brief, prepared in conformity with Rules 5.05 and 5.35. The cover of the petition shall:

(i) Identify which party is the petitioner, including the name of the specific party or parties on whose behalf the petition is filed, if there are multiple parties on the same side in the case;

(ii) Identify the date of the decision of the Court of Appeals;

(iii) Identify the means of disposition of the case by the Court of Appeals:

(A) If by opinion, the author of the challenged opinion and the other members of the court who concurred in or dissented from the court's decision;

(B) If without opinion (affirmed from the bench, affirmed without opinion, or per curiam), the members of the court who decided the case.

(iv) Contain a notice whether, if review is allowed, the petitioner intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals.

(b) Any party filing a petition for review shall serve two copies of the petition on every other party to the appeal or judicial review, and file with the Administrator an original petition, marked as such, and 12 copies, together with proof of service.

(4) Contents of Petition For Review

(a) The petition shall contain in order:

(i) A prayer for review.

(ii) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposed be established, if review is allowed.

(iii) A concise statement of each reason asserted for reversal or modification of the decision of the Court of Appeals, including appropriate authorities.

(iv) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the Court of Appeals should not be restated.

(v) A brief argument related to each reason asserted for review, if desired.

(vi) A statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court.

(vii) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.

(b) An assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with subparagraphs 4(a)(v) and (vi) of this rule.

Or. R. App. P. 9.20 Allowance of Review by Supreme Court.

(1) A petition for review of a decision of the Court of Appeals shall be allowed if one less than a majority of the judges eligible to vote on the petition vote to allow it.

(2) If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

(3) When the Supreme Court allows a petition for review, the court may request the parties to address specific questions. Those specific questions should be addressed at oral argument and may also be addressed in the parties' briefs on the merits or by additional memoranda. If addressed by additional memoranda, the original and 12 copies of such additional memoranda shall be served and filed not less than seven days before argument or submission of the case.

(4) The parties' briefs in the Court of Appeals will be considered as the main briefs in the Supreme Court, supplemented by the petition for review and any response, brief on the merits, or additional memoranda that may be filed.

(5) The record on review shall consist of the record before the Court of Appeals.

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(9)

No. 02-964

Supreme Court, U.S.
FILED
AUG 14 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

DENNIS N. BALSKE
KOIN Center, Suite 1600
222 S.W. Columbia
Portland, Oregon 97201
(503) 242-3831

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does a habeas corpus petitioner alert the state's court of last resort of the specific federal constitutional guarantee on which he bases his federal claim when: (1) by operation of state law the claim is by definition a federal claim; (2) under the law of the state's court of last resort, the identical legal standard is used to decide the state and federal claims; or (3) the state's statutes and rules ensure a fair opportunity to decide the claim?

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STATEMENT OF THE CASE

A. CONVICTION AND DIRECT APPEALS

In 1991, Mr. Reese was convicted on two counts of first-degree kidnaping and one count of first-degree attempted sodomy. He was sentenced to a thirty-year determinate sentence as a dangerous offender on each kidnaping count, to be served concurrently with each other. He was also sentenced to a thirty-six-month sentence for attempted sodomy, to be served consecutively to the kidnaping sentences.

Mr. Reese appealed. In *State v. Reese*, 114 Or. App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for resentencing. The Court of Appeals held that the trial court should have indicated a presumptive sentence. 114 Or. App. at 560, 836 P.2d at 738-39. With such an indication, Mr. Reese would not necessarily serve the entire thirty-year sentence because, once a presumptive sentence is served, an inmate becomes eligible for consideration for release to post-prison supervision. *Id.*

Mr. Reese was resentenced on March 4, 1993. Represented by the same attorney who had represented him at trial and at the first sentencing, he was resentenced to thirty years imprisonment as a dangerous offender on the kidnaping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Mr. Reese again appealed. In *State v. Reese*, 128 Or. App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for resentencing. It held that the "trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence,"

and it "failed to do so." 128 Or. App. at 326, 876 P.2d at 319.[1]

A different attorney was appointed to represent Mr. Reese at his resentencing. The resentencing proceeding took place with the attorney, but not Mr. Reese, present. After pronouncing the new sentence, the trial court had Mr. Reese brought to the courtroom. The court asked him whether he wanted his new lawyer to represent him. ER 84, CR 20, Ex. 1 at 16.[2] Mr. Reese stated, "I'll defend myself Your Honor," and explained why he did not want this new lawyer to represent him. *Id.* The court never explained to Mr. Reese any of the dangers and disadvantages of self-representation.[3] The court then asked the prosecutor whether he wanted to repeat the sentencing with Mr. Reese present. *Id.* The prosecutor opted for repeating the proceeding. *Id.* The court proceeded with the sentencing and, after the prosecutor presented his side, asked Mr. Reese if he wished "to say anything else on [his] behalf." *Id.* at 21.

The court then sentenced the unrepresented Mr. Reese to the identical sentence it set when Mr. Reese was not in the courtroom – a guidelines departure sentence of 260 months on each of the kidnaping convictions, to be served concurrently with each other, along with a thirty-six-month consecutive sentence for the attempted sodomy

[1] Under such a sentence, Mr. Reese would have become eligible for release to post-prison supervision in 121-130 months. *Id.*

[2] Ex. 1 is the record of Mr. Reese's second resentencing transcript, which was filed in the district court by Mr. Reese as an exhibit to his Memorandum in Opposition to Motion to Deny Habeas Corpus Relief.

[3] *See Faretta v. California*, 402 U.S. 806, 835 (1975) (accused must "be made aware of the dangers and disadvantages of self-representation").

conviction. To accomplish this result, the prosecutor dropped his request to sentence Mr. Reese as a dangerous offender. In this way, the court was able to avoid sentencing Mr. Reese to the "presumptive term" ordered by the Oregon Court of Appeals.

Mr. Reese appealed the second resentencing. He was appointed yet another lawyer. That lawyer did not raise either the vindictive sentencing, under *North Carolina v. Pearce*, 395 U.S. 711 (1969), or the *Faretta* violation. Instead, he filed a *Balfour* brief, the Oregon variant of an *Anders* brief.[4] A *Balfour* brief is filed when an appointed lawyer believes there are no issues of merit. Counsel prepares and signs a statement of facts and procedural history as Part A. Counsel then includes any issues that the appellant wishes to raise as Part B. This section is signed by the appellant.

Unlike the system described in *Anders*, the *Balfour* system does not require counsel to withdraw. Also unlike *Anders*, an Oregon appellate court presented with a *Balfour* brief does not engage in its own independent review of the entire record. *See State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991).

The Oregon Court of Appeals affirmed without opinion. *State v. Reese*, 134 Or. App. 629, 894 P.2d 1268 (1995). Mr. Reese's *Balfour* counsel did not seek review by the Oregon Supreme Court, even though Mr. Reese requested him to do so in order that he could take his case "to federal court."[5]

[4] *Anders v. California*, 386 U.S. 738 (1967).

[5] He wrote his appointed counsel:

> In response to your last letter I have only the thoughts of taking my case all the way to the Oregon Supreme Court on

(Continued on following page)

B. POST-CONVICTION REVIEW

Mr. Reese then filed a petition for post-conviction relief (PCR), in which he alleged that he had received ineffective assistance from his appellate counsel. The PCR trial court appointed counsel for Mr. Reese. Counsel filed a first amended formal PCR petition raising the claim of ineffective assistance of appellate counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 11, of the Oregon Constitution. J.A. 17-18.[6]

The PCR court denied the ineffective assistance of appellate counsel claim, citing only federal authority. In its Memorandum of Opinion, beneath the heading titled "Adequate Appellate Counsel," the court simply wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983)." J.A. 23.[7]

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appeal if this appeal is denied. This way I can take my case to federal court on post-conviction. We have come upon laws (Oregon) that states if one does not appeal to the Oregon Supreme Court then ones post-conviction will stay in the State of Oregon.

ER 84, CR 20, Ex. 2.

[6] Mr. Reese's *pro se* PCR petition referred neither to the Sixth and Fourteenth Amendments nor to the Oregon Constitution.

[7] Just above the court's decision on the appellate counsel claim was a separate heading entitled "Adequate Assistance of Counsel." Under that heading, the PCR court ruled, "Petitioner received adequate assistance of trial counsel," citing *Strickland v. Washington*, 466 U.S. 668, (1984), the leading federal precedent establishing the standard for ineffective assistance of counsel under the Sixth Amendment, and also citing *Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981), an Oregon case analyzing ineffective assistance claims under both the federal and Oregon Constitutions. J. A. 23.

Mr. Reese appealed. He was appointed still another counsel for the PCR appeal in the Oregon Court of Appeals. Mr. Reese's PCR appellate counsel filed a *Balfour* brief, just as Mr. Reese's direct appeal counsel had done. J.A. 27-41. For the section of the brief presenting the claims counsel thought without merit, counsel retyped Mr. Reese's *pro se* PCR petition rather than the amended petition that had been prepared by Mr. Reese's PCR attorney. J.A. 29-39. As a result, the *Balfour* brief did not explicitly cite to federal authority for the ineffective assistance of appellate counsel claim, as the amended petition had done. The state filed a motion for summary affirmance. The Oregon Court of Appeals granted the motion, summarily affirming the PCR court's decision without a written opinion. J.A. 42-43.

Mr. Reese then filed a petition for review in the Oregon Supreme Court. J.A. 44-51. He again alleged ineffective assistance of appellate counsel:

Statement of Legal Question(s) Presented on Review

Petitioner pleads several errors with respect to this case, including improper sentencing, *ineffective assistance of both trial court and appellate court counsel*, prosecutorial misconduct, improper waiver of jury and improper investigation.

Statement of reasons for reversal of Court of Appeals

The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, *ineffective assistance of both trial court and appellate court counsel*, prosecutorial misconduct, improper waiver of jury and improper investigation.

Statement of Facts

> . . . Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, *Petitioner alleges claims of error with respect to* improper waiver of a jury trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and *inadequate appellate counsel*.

J.A. 47-48 (emphasis added).

The petition also raised the issue of ineffective assistance of trial counsel. It cited to the Sixth and Fourteenth Amendments of the United States Constitution in support, as follows:

> Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th, and 14th Amendment rights have been violated.

J.A. 48. Mr. Reese did not cite the Oregon Constitution anywhere in his petition. Rather, in his Index of Authorities, he listed four separate provisions of the United States Constitution – the Fifth, Sixth, Eighth, and Fourteenth Amendments. J.A. 46.

The Oregon Supreme Court denied review.

C. FEDERAL HABEAS CORPUS

In his amended habeas corpus petition, Mr. Reese again alleged that his appellate counsel rendered ineffective assistance. The case was referred to a Magistrate Judge, who ruled that Mr. Reese had fairly presented his claim of ineffective assistance of appellate counsel. The Magistrate Judge recommended granting relief on that claim. Pet. Supp. App. 11-18.

The Magistrate Judge further ruled that the Oregon *Balfour* system is unconstitutional. Pet. Supp. App. 14-18. This Court then decided *Smith v. Robbins*, 528 U.S. 259 (2000). In response, the state moved the Magistrate Judge to reconsider her ruling. The Magistrate Judge reviewed further briefing from the parties and again ruled that the *Balfour* system is unconstitutional. Pet. Supp. App. 35-49.

The state objected to the Findings and Recommendation of the Magistrate Judge. It challenged the Magistrate Judge's conclusions that the *Balfour* system is unconstitutional and that Mr. Reese had fairly presented his claim of ineffective assistance of appellate counsel to the Oregon appellate courts.[8] The district court initially agreed with the Magistrate Judge, but ultimately overturned the Magistrate Judge's recommendation in response to the November 13, 2000, decision of the Ninth Circuit Court of Appeals in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). Pet. App. 33-36. Mr. Reese moved unsuccessfully for reconsideration. He then appealed to the Ninth Circuit Court of Appeals.

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[8] The Magistrate Judge recommended that Mr. Reese be given a new direct appeal to challenge the third sentencing proceeding, at which he was unrepresented and received a 260-month sentence (compared to the 121-130-month presumptive sentence ordered by the Court of Appeals). Pet. Supp. App. 50. If this Court affirms the Ninth Circuit's ruling, Mr. Reese will still be required to (1) complete and win a new appeal in the Oregon courts to (2) obtain a new (fourth) sentencing, (3) obtain a proper presumptive sentence, and (4) convince the parole board he is worthy of post-prison supervision, in order to gain release under the presumptive sentence that should have been entered twelve years ago and that would have made Mr. Reese eligible for supervised release in 2002.

D. THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit reversed the district court's decision. In a section entitled, "Scope of *Lyons*," it reaffirmed that *Lyons*'s "requirement of explicitly presenting a federal claim must be satisfied at the highest levels of the state court system to ensure that possibilities of the state courts resolving federal issues relating to state prisoners have been truly exhausted." Pet. App. 12. The court also acknowledged the dictates of *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999):

> To exhaust a claim in the state courts, a habeas petitioner must, in addition to complying with *Lyons*, present that claim to the state's highest court, even if that court has discretionary control over its docket.

Pet. App. 13 (citing *O'Sullivan*, 526 U.S. at 845). It construed *O'Sullivan* to require a habeas petitioner to alert the highest state court to "the specifically federal nature of a claim in order to exhaust it." *Id.*

The court, applying relevant Oregon law, then determined that the Oregon Court of Appeals had been fairly presented with Mr. Reese's federal ineffectiveness of appellate counsel claim. Pet. App. 14-15; *see* Or. Rev. Stat. § 138.640 (1999); Or. R. App. P. 9.20(2). Citing this Court's decision in *Duncan v. Henry*, 513 U.S. 364, 365-366 (1995), the court determined that Mr. Reese fairly presented the issue to the Court of Appeals:

> To summarize our views: Reese raised the ineffective assistance of appellate counsel claim and cited federal authority in his petition to the PCR court. The PCR court cited only federal law in deciding the issue, and under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66, 115 S. Ct. 887.

Pet. App. 15.

The court then addressed the issue of fair presentation to the Oregon Supreme Court. *Id.* at 16-19. Once again adhering to the dictates of *Duncan*, the court held that Mr. Reese met its fair presentation requirement because the Oregon Supreme Court had a fair opportunity to pass on his claims.

> The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the state "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis in internal quotations omitted). *See also Lyons*, 232 F.3d at 668 ("to satisfy the exhaustion requirement of § 2254, habeas petitioners must 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights.'" (quoting *Duncan*, 513 U.S. at 365, 115 S. Ct. 887)). Comity requires only that we do not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.

Pet. App. 18 (emphasis by court).

SUMMARY OF ARGUMENT

This Court's cases make plain that Mr. Reese had two responsibilities. First, he had to present the substance of his federal habeas corpus claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Second, he had to "give the [Oregon] courts one full opportunity to resolve any constitutional issues by invoking one complete round of [Oregon]'s established appellate review process." *O'Sullivan*, 526 U.S. at 845.

The Ninth Circuit, however, demanded more. Citing *Duncan*, 513 J.S. at 365-366, it held that Mr. Reese was not only required to present the substance of his claim to the state's highest court, but was required to alert the court "to the specifically federal nature of the claim presented." Pet. App. 13. It concluded Mr. Reese met this more stringent standard. Whether or not this Court reads *Duncan* as requiring a more stringent standard, by virtue of Oregon law, Mr. Reese met it.

A state prisoner can sufficiently alert the state's highest court to the substance of his federal habeas corpus claim without citing, in that court, a specific provision of the federal Constitution, nor any federal cases. The state concedes as much. According to the state, "some claims may necessarily be federal where there is no state counterpart." Pet. Br. at 41.

In Oregon, there are three distinct ways that a habeas petitioner can alert the Oregon appellate courts to the federal nature of his claim without citing the federal Constitution or federal law. First, if a petitioner uses the federal term of art "ineffective assistance of counsel," a term the Oregon courts recognize as denoting a federal claim, he alerts the Oregon courts to the federal nature of his claim. Second, a petitioner provides an Oregon appellate court a fair opportunity to consider his federal claim if the standard used to decide the claim under the state and

federal Constitutions is identical. Third, if a PCR trial court decides an ineffectiveness claim solely on federal grounds, and the petitioner claims on appeal that he received ineffective assistance of appellate counsel, Oregon's PCR statutes and case law ensure that the Oregon appellate courts are provided a fair opportunity to decide the federal claim of ineffective assistance.

Mr. Reese's case fits all three criteria.

- When Mr. Reese claimed that he received "ineffective assistance of appellate counsel" in the Oregon appellate courts, J.A. 32, 47, those courts were alerted to the federal nature of the claim and had a fair opportunity to decide it because, under Oregon law, the term "ineffective assistance" federalizes the claim.
- Even if the Oregon Supreme Court failed to recognize the federal nature of the claim, it necessarily had to employ the same test to decide it, because under *Guinn v. Cupp*, 304 Or. 488, 495-96, 747 P.2d 984, 988-89 (1988), the Oregon Supreme Court employs only one standard to decide claims of ineffective assistance of *appellate* counsel, whether brought under the federal or Oregon Constitution or both. Thus, Mr. Reese gave the Oregon Supreme Court the fair opportunity that comity requires – an opportunity to apply its standard for ineffectiveness of appellate counsel, a unitary standard for claims under either the state or federal Constitution.
- Mr. Reese asserted in his petition for review by the Oregon Supreme Court, as one of his reasons for reversal, that he had received "ineffective assistance of appellate counsel." This was a direct challenge to the memorandum decision of the PCR trial court, a decision resting solely on federal law, pursuant to Or. Rev. Stat. § 138.640, by citing explicitly to a federal case in

deciding Mr. Reese's claim of ineffective assistance of appellate counsel.[9] The trial court's ruling on the federal claim was followed by a decision on the merits pursuant to Or. Rev. Stat. § 138.660 by the Oregon Court of Appeals, which "examin[ed] anew the [PCR] court's constitutional determinations." *Davis v. Armenakis*, 151 Or. App. 66, 69, 948 P.2d 327, 329 (1997).

For any of these reasons, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. MR. REESE EXHAUSTED HIS FEDERAL CONSTITUTIONAL CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY GIVING THE OREGON APPELLATE COURTS THE REQUIRED "FAIR OPPORTUNITY" TO ADDRESS IT.

Mr. Reese raised his federal constitutional claim of ineffective assistance of appellate counsel in a petition for post-conviction relief. J.A. 17. He appealed the denial of that petition, J.A. 20-26, to the Oregon Court of Appeals. J.A. 27-41. He then petitioned for review of the Court of Appeals's order of summary affirmance, J.A. 42-43, in the Oregon Supreme Court. J.A. 44-52. Mr. Reese thereby complied with *O'Sullivan*'s requirement that he invoke

[9] In its Ninth Circuit brief, the state conceded that the PCR court decided Mr. Reese's ineffective assistance of appellate counsel claim "on a federal ground" when the PCR court cited *Jones v. Barnes*, 463 U.S. 745 (1983). Resp. Br. at 20. The state has retreated slightly in its Brief to this Court, arguing that "the parties agree that Reese presented a federal claim of ineffective assistance of appellate counsel in the post-conviction trial court" and that the trial court ruled on at least part of that claim. Pet. Br. at 5.

"one complete round" of Oregon's appellate review process. 526 U.S. at 845. Additionally, Mr. Reese fairly presented the substance of his ineffective assistance claim, in accordance with the rule of *Picard v. Connor*, by requesting relief in the Oregon appellate courts, J.A. 32, 47-48, from the adverse decision of the PCR trial court, a decision which was rendered on explicitly and solely federal grounds, J.A. 17.

Mr. Reese thus did all that this Court has asked state prisoners to do in order to exhaust properly their federal constitutional claims in state court. The Ninth Circuit recognized as much. This Court should affirm the judgment of the Ninth Circuit.

A. MR. REESE COMPLIED WITH *O'SULLIVAN* BY PRESENTING HIS FEDERAL CLAIM TO THE OREGON SUPREME COURT IN A PETITION FOR DISCRETIONARY REVIEW.

The statute governing federal habeas corpus claims generally requires state prisoners to "exhaust[ ] the remedies available in the courts of the State" before bringing their claims to federal court. 28 U.S.C. § 2254(b)(1)(A).[10] This requirement "reflects a policy of federal-state comity." *Picard*, 404 U.S. at 275. Federalism and comity dictate that state prisoners do more than merely raise their federal claims once in state court. Rather, state prisoners

[10] There are exceptions to the exhaustion requirement. Exhaustion is not mandated if "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). *See also Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974); *Young v. Ragen*, 337 U.S. 235, 238-239 (1949).

must "give state courts a *fair* opportunity to act on their claims . . . by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 844-845 (emphasis in original). Mr. Reese complied with this requirement, and with the underlying mandate of comity, by raising his federal ineffective assistance of appellate counsel claim in such a manner that the operation of Oregon law made its federal nature plain to Oregon courts.

Although the Court extended the fair presentation requirement to discretionary review petitions in *O'Sullivan*, the Court's decision did not turn on the specifics of what constitutes fair presentation. In his petition for discretionary review by the Illinois Supreme Court, the prisoner in *O'Sullivan* abandoned three of the six claims he had presented to the Illinois Appellate Court. 526 U.S. at 841-842. Mr. Reese, by contrast, raised every claim he had made in the Oregon Court of Appeals before the Oregon Supreme Court, including the claim of ineffective assistance of appellate counsel. *Compare* J.A. 27-41 (PCR *Balfour* brief) *with* J.A. 44-51 (PCR petition for review). Mr. Reese therefore did all that the Court required in *O'Sullivan*.

The state, as shown by the phrasing of the question it presented to this Court on certiorari, makes a single argument: that Mr. Reese failed to describe specifically enough the federal contours of his claim in his petition for review by the Oregon Supreme Court. *See* Pet. for Cert. at i (twice limiting its invocation of this Court's case law to points concerning "the state's highest court").[11] Mr. Reese

[11] By its question presented, the state narrowed this Court's focus on the fair presentation made in Mr. Reese's petition for review to the Oregon Supreme Court. In its merits brief, however, the state reverts to

(Continued on following page)

contends that he complied with this Court's requirements at every step of the process, but the state is particularly mistaken in asserting he failed to follow this Court's clear and simple direction in *O'Sullivan*.

O'Sullivan simply required a proper presentation of federal claims, not a formulaic incantation of magic words. In explaining where it parted ways with the dissent, the *O'Sullivan* majority said that its

> disagreement with Justice Stevens in this case turns on our differing answers to the . . . question . . . whether a prisoner who fails to present his claims in a petition for discretionary review to a state court of last resort has *properly* presented his claims to the state courts.

526 U.S. at 848 (emphasis in original). The bulk of the Court's policy debate in *O'Sullivan* concerned the proper allocation of judicial resources. *Id.* at 845-848; *id.* at 857-862 (Stevens, J., dissenting); *id.* at 862-864 (Breyer, J., dissenting). The decision, in sum, was about the need to include state courts of last resort among those from which a state prisoner seeks relief before seeking it from a federal habeas court.

O'Sullivan was not a decision about any other point of law. It did not prescribe a formula petitioners must use when petitioning the highest state court for relief to satisfy the second *Picard* requirement that the federal claim's substance be made clear to the state courts. There

its previous position, rejected by the Ninth Circuit, that Mr. Reese failed to fairly present his claim to the Oregon Court of Appeals, as well as to the Oregon Supreme Court. Pet. Br. at 12, 42-43. Although this brief will principally focus on Mr. Reese's petition in the Oregon Supreme Court, it will also, to a lesser extent, address Mr. Reese's *Balfour* brief in the Oregon Court of Appeals.

was no dispute that Boerckel did not raise three of his issues in any fashion in the state's highest court. This Court was not asked, in *O'Sullivan*, to decide precisely how those claims should be raised in the state's highest court. That is the real question presented by Mr. Reese's case.

B. MR. REESE MET THE STANDARD OF FAIR PRESENTATION ENUNCIATED IN *PICARD*, A STANDARD THAT *DUNCAN* LEFT UNCHANGED.

Mr. Reese gave the Oregon Supreme Court an opportunity to decide his federal constitutional claim of ineffective assistance of appellate counsel by raising that claim – which had been raised in his *Balfour* brief to the Oregon Court of Appeals, *see* Or. R. App. P. 9.20(2), as well as in the post-conviction trial court – in his petition for review. In fact, he did more: he gave every level of the Oregon court system a *fair* opportunity to decide his federal constitutional claim, by presenting the substance of his claim to the Oregon courts.

1. Fair Opportunity Is the Key to Fair Presentation.

To exhaust a federal claim, a state prisoner must give the state courts a "fair opportunity" to decide it before bringing it to federal court. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *O'Sullivan*, 526 U.S. at 844; *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). This Court required habeas petitioners to exhaust their claims in state court long before the 1948 Judicial Code codified the exhaustion requirement now found at 28 U.S.C. § 2254(b)-(c). *Ex parte Royall*, 117 U.S. 241 (1886). The exhaustion doctrine is sufficiently central to habeas corpus procedure

that a federal habeas petition containing even one unexhausted claim – a "mixed petition" – must be dismissed if the petitioner will not amend it to delete that claim. *Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982).[12]

"The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent destruction of state judicial proceedings." *Rose*, 455 U.S. at 518 (citing *Braden v. 30th Judicial Circuit of Kentucky*, 410 U.S. 484, 490-91 (1973)). This Court has consistently held that the cornerstone of the exhaustion doctrine is petitioners' fair presentation of their federal constitutional claims to state courts. *Picard*, 404 U.S. at 275-276; *Smith v. Goguen*, 415 U.S. 566, 577 (1974); *Anderson v. Harless*, 459 U.S. 4, 7 (1982) (per curiam). More recent decisions clarifying aspects of the exhaustion requirement have adhered to this consistent holding. *Keeney*, 504 U.S. at 10; *Duncan*, 513 U.S. at 365-366; *O'Sullivan*, 526 U.S. at 848.

"Opportunity" is the word with which this Court has for decades defined the related terms "exhaustion" and "fair presentation." *See O'Sullivan*, 526 U.S. at 844; *Duncan*, 513 U.S. at 365; *Anderson*, 459 U.S. at 7; *Rose*, 455 U.S. at 518-519; *Picard*, 404 U.S. at 275; *Darr v. Burford*, 339 U.S. 200, 204 (1950). An opportunity is enough, so long as it is a fair opportunity, because "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard*, 404 U.S. at 275. State prisoners need not pad their state pleadings with every verbal formulation they can imagine using in a future federal habeas petition in order to assure that their state pleadings match their anticipated federal

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[12] While "to be strictly enforced," however, the requirement is not jurisdictional. *Strickland*, 466 U.S. at 684.

pleadings with pinpoint accuracy. *Picard*, 404 U.S. at 278. Rather, a state prisoner is obligated only to give the state courts a "fair opportunity" to decide his federal claim before he brings it to federal court. *Edwards*, 529 U.S. at 453; *O'Sullivan*, 526 U.S. at 844; *Keeney*, 504 U.S. at 10.

Contrary to the state's assertion, the Ninth Circuit did not transform the fair presentation requirement into a fair opportunity requirement. Pet. Br. at 12. Rather, as can be seen from this Court's cases, fair presentation has always been synonymous with fair opportunity. In Mr. Reese's case, the Oregon state courts had a fair opportunity to decide his federal claim, because: (1) the Oregon PCR trial court chose to address it as a federal claim; (2) under Oregon law, the term "ineffectiveness" denotes a federal claim;[13] and (3) Oregon applies the same standard to determine claims of ineffective assistance of appellate counsel whether they are brought under the state or federal Constitutions, or both. *Guinn*, 304 Or. at 495-96, 747 P.2d at 988-89.[14]

2. A Fair Opportunity Arises When the Petitioner Presents the Substance of the Federal Claim.

The standard of what constitutes a fair opportunity was set in 1971 by *Picard* and has not changed. In *Picard*, prisoner Connor pressed on appeal a claim that his indictment was invalid on Fifth Amendment grounds. Following the denial of his appeals, he sought habeas relief in the District of Massachusetts. The District Court denied his petition. The First Circuit discovered on its own

[13] *See* § IIB(1)(b) at 27-29, *infra*.

[14] *See* § IIB(2) at 29-35, *infra*.

that there might also have been a Fourteenth Amendment equal protection problem. It ordered supplemental briefing on that point. In that supplemental briefing, Massachusetts complained that Connor had not exhausted the equal protection claim. The First Circuit held that the writ should be granted anyway. *Picard*, 404 U.S. at 271-274.

This Court reversed. The Court explained that it did so because respect for the principle of comity constrained it to hold "that the substance of a federal habeas corpus claim must be presented to the state courts." *Id.* at 278. In Connor's case, the state courts had not been provided with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Id.* at 277. The Court cautioned that by its decision – that a "claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination" – it was not implying that a habeas petitioner must raise his claim "by citing 'book and verse on the federal constitution.'" *Id.* at 278 (citations omitted).

This Court has cited the *Picard* requirement with approval time and again. For instance, in *Vasquez v. Hillery*, the Court held that expansion of the record in the district court does not create exhaustion problems so long as "the prisoner has presented the substance of his claim to the state courts." 474 U.S. 254, 257-258 (1986) (citing *Picard*, 404 U.S. at 278). In *Smith v. Goguen*, the Court found exhaustion when "the 'substance' of th[e] claim [at issue] was 'fairly presented' to the state courts under the exhaustion standards of *Picard*, [404 U.S.] at 275, 278 . . . " *Smith*, 415 U.S. at 577. And in *Anderson v. Harless*, the Court held that in order to see a claim adjudicated on the merits, a habeas petitioner "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." 459 U.S. at 7.

This Court relied on *Anderson* as well as *Picard* in *Duncan*, 513 U.S. at 366. On direct appeal, Henry had objected to what he termed a "miscarriage of justice" in violation of the California Constitution. In federal habeas, by contrast, Henry had raised a Fourteenth Amendment due process claim. The Court of Appeals found that Henry had exhausted his claim, explaining that to state such a claim "it is not necessary to invoke 'the talismanic phrase "due process of law."'" *Henry v. Estelle*, 33 F.3d 1037, 1040 (9th Cir. 1994) (quoting *Tamapua v. Shimoda*, 796 F.2d 261, 262-263 (9th Cir. 1986)); *Duncan*, 513 U.S. at 365.

This Court summarily reversed. Like Connor, Henry had erroneously been granted relief on the basis of a fundamentally different claim in federal court than he had made in state court. Unlike Mr. Reese, Henry had never once made plain the federal nature of his claim, relying instead on the California Constitution and its ambiguous "miscarriage of justice" standard. 513 U.S. at 365-366. In contrast, Mr. Reese exhausted his federal claim by requesting the Oregon Court of Appeals and the Oregon Supreme Court to reverse the adverse decision of the PCR trial court, a federal-law decision, complaining specifically of "ineffective assistance of appellate counsel." J.A. 32, 47.[15]

Duncan, a *per curiam* decision rendered without full briefing or argument, did not alter but only restated the law of exhaustion and fair presentation. The opinion made no lengthy inquiry into first principles, as had *Picard*. Rather, the *Duncan* Court held that *Picard* and *Anderson* "control[led] the outcome." *Id.* at 366. Although the Court suggested that exhaustion requires an explicit reference in

[15] *See* § IIB(1)(b) at 27-29, *infra*.

the state courts to the federal basis for the claim, the suggestion is *dicta*.[16]

Most circuit courts of appeal continue to follow *Picard*. Specifically, six of the eleven circuits overseeing § 2254 cases – the Second, Third, Sixth, Seventh, Eighth, and Tenth – use a "substance of the claim" test to determine fair presentation questions. *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (*en banc*); *Ramirez v. Attorney General*, 280 F.3d 87, 90, 94-95 (2d Cir. 2001); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Carter v. Bell*, 218 F.3d 581, 606-607 (6th Cir. 2000); *McMeans v. Brigano*, 228 F.3d 674, 681-682 (6th Cir. 2000); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Odem v. Hopkins*, 192 F.3d 772 (8th Cir. 1999); *Nichols v. Sullivan*, 867 F.2d 1250, 1252-1253 (10th Cir. 1989); *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997); *Thomas v. Gibson*, 218 F.3d 1213, 1221 n. 6 (10th Cir. 2000).

Mr. Reese complied with *Picard*'s clear rule as this Court has described that rule over and over. He presented the substance of his claim to the state courts. No more was required.

[16] "When the Court actually explained why it found the claim before it to be unexhausted, it did not rely exclusively on the petitioner's failure to make the federal law basis for the claim explicit in state court. Rather, the Court relied, in addition, on (a) the petitioner's failure in any *other* way to 'apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment' and (b) aspects of his state court pleadings that caused the state court 'understandably' to 'confine its analysis to the application of state law.'" Randy Hertz and James S. Liebman, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 4th § 23.3(c), at 976 (Lexis 2000) (footnotes omitted) (emphasis in original).

II. EVEN IF *DUNCAN* ESTABLISHED A NEW STANDARD, MR. REESE MEETS ALL ITS REQUIREMENTS.

Should the Court disagree and hold that *Duncan*'s *per curiam* summary reversal changed the preexisting law, creating a stricter standard than the one the Court has applied for more than a half century, *Darr*, 339 U.S. at 204, the Court should nevertheless affirm the Ninth Circuit's judgment. Oregon law ensured that the Oregon appellate courts were provided an opportunity to decide the federal claim decided by the PCR trial court – especially in light of the Oregon Supreme Court's standard for ineffectiveness of appellate counsel, which is the same whether a claim is brought under the Oregon or United States Constitutions or both. *Guinn*, 304 Or. 488, 747 P.2d 984.[17]

In seeking certiorari, the State asked this Court whether "a state prisoner 'alert[s]' the State's highest court that he is raising a federal claim when – in that court – he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis." The state now concedes, in its brief, that under the appropriate state law circumstances, the answer is "yes."

> Similarly, some claims may necessarily be federal where there is no state counterpart. For example, the Oregon Constitution does not contain a due process clause; a reference to a "due process violation" in Oregon courts necessarily alerts the state courts that a federal claim is being presented.

[17] A full discussion of *Guinn* appears in § IIB(2) at 29-35, *infra*.

Pet. Br. at 41. The state's concession that the Oregon courts need not be alerted by citation to a specific provision or case should extend to other situations in which Oregon courts are given an opportunity to decide federal claims when the federal claims are not expressly identified.

Mr. Reese's case presents just such a situation. The Oregon Supreme Court necessarily considered the federal ground of ineffective assistance of appellate counsel, previously decided by the state trial court, for three reasons. First, in Oregon, state courts recognize the use of the words "ineffective assistance" as denoting the federal nature of an ineffectiveness claim. Second, the standard used by the Oregon Supreme Court to decide such a claim is the same whether the claim is brought under the state or federal Constitution, or both. Third, Oregon's PCR statutes and case law provided the Oregon appellate courts with a fair opportunity to address Mr. Reese's federal ineffective assistance claim.

A. *Duncan* and *Gray* Interpret *Picard*'s Fair Presentation Rule to Require Habeas Petitioners to Alert State Courts to Specific Constitutional Guarantees.

In deciding whether Mr. Reese fairly presented his claim, the Ninth Circuit held that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it." Pet. App. 13. Relying on a previous circuit decision, *Lyons*, 232 F.3d at 669, the court held that a "petitioner can exhaust a claim only by both raising the claim and explicitly indicating the claim is a federal one." Pet. App. 13.

The importance of focusing on "a specific federal constitutional guarantee" was emphasized in *Gray v. Netherland*, 518 U.S. 152, 162-163 (1996).

> In *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509, 30 L.Ed.2d 438 (1971), we held that, for purposes of exhausting state remedies, the claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.[18]

The question in Mr. Reese's case then, is, what constitutes "reference to a specific federal constitutional guarantee"?

The answer necessarily depends on the bedrock for the exhaustion doctrine, the principle of comity. Comity provides the states with the first opportunity to enforce the federal Constitution. To honor comity is to respect state law practices for deciding whether a given constitutional claim is state, federal, or both. Oregon courts routinely understand particular terms of art established under federal law to invoke the protection of specific federal constitutional guarantees, even without citation of the federal constitutional provisions underlying those guarantees.

Mr. Reese both used the relevant terms of art and sought relief under a standard that is identical for both state and federal claims. Given the absence of explicit constitutional language, federal protection against ineffective assistance of counsel – much less ineffective assistance of appellate counsel – cannot be invoked under either *Picard* or *Duncan* by simply citing the Sixth Amendment or even its provision relating to a right to

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[18] Although the *Gray* majority attributed this requirement to *Picard* rather than *Duncan*, *Picard* did not require "reference to a specific federal guarantee," but rather held that "the substance of a federal habeas corpus claim must first be presented to the state courts." 404 U.S. at 278.

counsel. The petitioner must necessarily say "ineffective assistance of counsel" and "appellate." Because Mr. Reese made those references, and because under Oregon law they invoke federal law, Mr. Reese gave the Oregon courts *more* notice of the precise federal claim he was raising than he could possibly have done by citing the underlying constitutional provision itself.

B. A State Prisoner Properly Alerts a State Court to a Specific Federal Constitutional Guarantee Without Citing It by Number If: (1) By Operation of State Law the Claim Is by Definition a Federal Claim; (2) Under the Law of the State's Court of Last Resort, the Identical Legal Standard Is Used to Decide the State and Federal Claims; or (3) The State's Statutes and Case Law Ensure a Fair Opportunity to Decide the Claim.

There are three categories of Oregon cases in which the Oregon courts are alerted to specific federal constitutional guarantees without specific citation to the federal Constitution or federal cases. The first is when, by operation of state law, the claim is by definition a federal claim.

1. When Mr. Reese Claimed He Received "Ineffective Assistance," the Oregon Appellate Courts Were Alerted to the Federal Nature of the Claim by Operation of State Law.

In Oregon, by operation of state law, a claim is by definition a federal claim: (1) when a habeas petitioner alleges a violation of a specific right that is not addressed by a state constitutional provision; and (2) when the

petitioner uses a term of art that alerts the court to the federal nature of the claim.

a. The State Concedes an Oregon Petitioner Alerts the State Courts to the Federal Nature of His Claim Without Citing the Federal Constitution or a Federal Case When He Alleges a Violation of a Specific Guarantee That Is Not Addressed by an Oregon Constitutional Provision.

The Oregon Constitution has neither an equal protection clause nor a due process clause.[19] Thus, as the state concedes, if an Oregon habeas petitioner claims in state court that his due process right to a fair trial was violated, the Oregon courts are alerted to a specific federal constitutional guarantee – a fair-trial guarantee arising under the Fourteenth Amendment due process clause – because there is no Oregon due process clause. Pet. Br. at 41; *Adamson v. California*, 332 U.S. 46, 53 n. 11 (1947). In determining whether to review such a case, the Oregon Supreme Court will, by definition, be alerted to the federal nature of the claim, and comity will be served.

Oregon is not alone. Many states do not have state constitutional provisions that correspond to those from the federal Constitution. For example, the constitutions of twenty-one other states lack equal protection clauses. Jennifer Friesen, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 3d § 3-1(b),

[19] Or. Const. art. I (Bill of Rights); *see* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988).

at 3-8 & n. 28 (Lexis 2000).[20] The constitutions of thirteen states besides Oregon do not contain the words "due process of law."[21] Six states prohibit "cruel" punishments but not "unusual" punishments.[22] In such states, the use of federal constitutional terminology pertaining specifically to the nonduplicated guarantee is sufficient to put the state courts on notice that a petitioner is pressing a federal claim.

b. By Claiming He Received "Ineffective Assistance," Mr. Reese Alerted the Oregon Appellate Courts to the Federal Nature of His Claim.

In Oregon, the distinction between the terms "inadequate assistance of counsel" and "ineffective assistance of counsel" is of legal moment. The former refers to a claim raised under the Oregon Constitution and the latter to a

[20] Twelve states, though having no equal protection clause, have an equal privileges and immunities clause akin to Oregon's. *See* Ala. Const. art. I, § 2; Ariz. Const. art. II, § 13; Ark. Const. art. II, § 18; Ind. Const. art. I, § 23; Iowa Const. art. I, § 6; Ky. Bill of Rights, § 3; N.D. Const. art. I, § 21; S.D. Const. art. VI, § 18; Tex. Const. art. I, § 3; Va. Const. art. I, § 4; Vt. Const. ch. I, art. 7; Wash. Const. art. I, § 12. Courts generally do not interpret equal privileges and immunities clauses to mean the same thing as equal protection clauses, however. David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 274-275 & nn. 7-10 (1992). Nine states lack even an equal privileges and immunities clause: Delaware, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, Oklahoma, Rhode Island, and Tennessee. Friesen, 1 STATE CONSTITUTIONAL LAW § 3-1(b), at 3-8 n. 28.

[21] Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, North Carolina, Texas, Vermont, and Wisconsin.

[22] *See* Del. Const. art. I, § 11; Ky. Bill of Rights, § 17; Pa. Const. art. I, § 13; R.I. Const. art. I, § 8; S.D. Const. art. IV, § 23; Wash. Const. art. I, § 14.

claim raised under the federal Constitution. Thus, in the trial-counsel context, the Oregon Court of Appeals has expressed its standards for decision as follows:

> In order to prove his allegation of *inadequate assistance* of trial counsel under the *Oregon* Constitution, petitioner must show that counsel failed to exercise professional skill and judgment, failed to diligently and conscientiously advance the defense and that the failure prejudiced his defense. *Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981). To sustain his claim of *ineffective* counsel under the *federal* constitution, he must prove that, considering all the circumstances, counsel's assistance was unreasonable and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Chew v. State, 121 Or. App. 474, 477, 855 P.2d 1120, 1121 (1993) (emphasis added); *see also Long v. State*, 130 Or. App. 198, 201-202, 880 P.2d 509, 511 (1994) (quoting *Chew*'s delineation of the two standards with approval). Federal courts recognize the importance of honoring the Oregon courts' distinction between the standards. *See Peterson v. Lampert*, 319 F.3d 1153, 1155, 1158-1159 (9th Cir. 2003) (*en banc*) (finding claims unexhausted under *O'Sullivan* when, *inter alia*, petitioner claimed only "inadequate" assistance of counsel and cited only Oregon law before the Oregon Supreme Court). The state acknowledges this distinction. Pet. Br. at 4 n. 5.

Mr. Reese made his claim of ineffective assistance of appellate counsel under both the federal and Oregon Constitutions in his amended petition for post-conviction relief. J.A. 17. There, he labeled it a claim that he was

denied "adequate" assistance, in keeping with the state-law-first practice of the Oregon courts. *Id.*; *see State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983). In the same sentence, Mr. Reese cited the Sixth and Fourteenth Amendments. J.A. 17. This federalized his claim, as the state concedes. Pet. Br. at 5.

After the PCR trial court decided his ineffective assistance of appellate counsel claim on solely federal grounds, J.A. 23, Mr. Reese exhausted his federal claim by appealing it to the Oregon Court of Appeals and petitioning for review in the Oregon Supreme Court. Before those courts, Mr. Reese referred to his claim almost exclusively as a claim of "ineffective," not "inadequate," assistance. J.A. 32 (PCR appeal *Balfour* brief), 47-48 (PCR petition for review). The sole use of the phrase "inadequate assistance of counsel" came in the statement of facts section of Mr. Reese's PCR petition for review. J.A. 48. Unlike, for example, Peterson, Mr. Reese never cited any provisions of the Oregon Constitution anywhere in his *Balfour* brief or in his petition for review. *Cf. Peterson*, 319 F.3d at 1157.

2. The Oregon Supreme Court Prescribes the Identical Test for Determining Ineffective Assistance of Appellate Counsel under the Oregon and United States Constitutions.

The second category of cases where a state prisoner properly alerts a state court to a specific federal constitutional guarantee without citing it by number includes cases in which the state courts apply an identical legal standard to federal and state constitutional guarantees. Again, Oregon provides a good example. In Oregon, when a PCR petitioner raises a claim of ineffective assistance of appellate counsel, the Oregon Supreme Court applies the identical test to the claim under Article I, Section 11, of

the Oregon Constitution and under the Sixth and Fourteenth Amendments to the United States Constitution. *Guinn,* 304 Or. at 495-96, 747 P.2d at 988-89. In other words, in this instance as well as those in which the Oregon Constitution omits protections included in the federal Constitution, any right to relief is dependent upon federal law as interpreted by the Oregon Supreme Court. For an Oregon court to decide the claim is necessarily for it to decide a *federal* claim.

Whether or not the Oregon appellate courts understood the federal basis of Mr. Reese's claim, the *Guinn* standard ensures that they still had the same opportunity to decide it. In *Guinn*, the Oregon Supreme Court for the first and only time set the standard it would apply to claims of ineffective appellate representation. It did so in a case in which a PCR appellant raised the ineffectiveness of his direct appeal counsel under both the federal and state Constitutions. 304 Or. at 491, 747 P.2d at 986. In setting its single standard for determining adequate assistance of appellate counsel, the Oregon Supreme Court did not differentiate between the federal and state Constitutions. Rather, it set one standard for both.

> This court has not heretofore discussed *the standard* of conduct of appellate counsel in meeting the "adequate assistance of counsel" requirements of Article I, section 11, or the Sixth Amendment.

304 Or. at 495, 747 P.2d at 988 (emphasis added).

The *Guinn* Court only differentiated between the standards for trial and appellate counsel. In doing so, it emphasized the single "standard applicable to appellate counsel." *Id.* The court then articulated the standard it would employ under the state and federal Constitutions to determine the issue of ineffective appellate representation:

> A plaintiff seeking post-conviction relief stemming from a claim of inadequate assistance of appellate counsel for failing to assert a claimed error must establish (1) that a competent appellate counsel would have asserted this claim, and (2) that had the claim of error been raised, it is more probable than not that the result would have been different.

304 Or. at 496, 747 P.2d at 989. It then applied this standard to Guinn's *state and federal* claim of ineffective appellate representation and remanded the case to the PCR trial court for a determination of whether Guinn was prejudiced by his appellate counsel's failure to challenge Guinn's shackling in front of the jury. 304 Or. at 496-499, 747 P.2d at 989-990.[23]

Thus, although by operation of Oregon law the Oregon appellate courts were alerted to the federal nature of Mr. Reese's claim, the Oregon appellate courts would have not treated the claim any differently even had they not been so alerted. Mr. Reese gave the Oregon Supreme Court a fair opportunity to decide the ineffective appellate counsel claim under the one and only test employed by that court.[24]

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[23] Guinn pled his claim as one of ineffective assistance: "the petitioner was denied the assistance of effective appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 11 of the Constitution of the State of Oregon." 304 Or. at 491, 747 P.2d at 986. The Oregon Supreme Court used the term "inadequate assistance" in setting its standard, even though it stated that the "ultimate issue" was whether "the defendant 'was denied the assistance of effective appellate counsel.'" 304 Or. at 494, 747 P.2d at 987.

[24] The Ninth Circuit, in an unpublished opinion, has recognized the equivalence of the state and federal standards for ineffective assistance of appellate counsel in Oregon under *Guinn*. *Turner v. Maass*, 980 F.2d 738 (table), 1992 WL 354145 at * 2 (9th Cir. Nov. 30, 1992).

The state argues that a ruling for Mr. Reese would burden the state courts to identify the federal nature of an ineffective assistance of counsel claim. Pet. Br. at 15-16. The state's argument misses the mark. The real burden is and has always been on habeas corpus petitioners to demonstrate that they fairly presented their claims. The state courts entertain the claims as they see fit. If a petitioner later chooses to challenge one of those rulings, the petitioner, not the state or state courts, must then demonstrate that he fairly presented the issue to the state courts.

More to the point, the Oregon courts were not burdened in Mr. Reese's case because, under the Oregon Supreme Court's own decision, the Oregon Supreme Court necessarily applies only one standard to claims of ineffective assistance of appellate counsel, whether the claim is brought under the state or federal Constitution, or both.

Amici Indiana et al. (state amici) advocate that in states that apply separate standards under their own constitutional provisions to constitutional claims, it is important for prisoners to alert those state courts that their claims are federal. General claims, argue the state amici, will not alert the state courts to the federal claim. State Amici Br. at 8. Oregon, however, is not such a state. In Oregon, where the Oregon Supreme Court applies the same test to determine all claims of ineffective appellate counsel, there is no need to alert the court to the federal nature of such a claim through citing particular federal sources. In Oregon, the claim is to be determined under the Oregon Supreme Court's unitary standard, whether the claim is brought under the state or federal Constitution, or both.

Oregon is not alone. Other states apply identical tests to federal and state constitutional claims. Since 1982, Florida has interpreted its state search and seizure clause

in conformity with the federal Fourth Amendment. *Bernie v. State*, 524 So.2d 988 (Fla. 1988) (construing Fla. Const. art. I, § 12); *see also* Cal. Const. art. I, § 28(d).[25] Montana interprets its state constitutional proscription of compelled self-incrimination identically to that contained in the federal Fifth Amendment. *State v. Jackson*, 206 Mont. 338, 672 P.2d 255 (1983). Some states even interpret differently worded state constitutional provisions in lockstep with federal analogues. *E.g., Press Inc. v. Verran*, 569 S.W. 2d 435, 442 (Tenn. 1978) (differently worded state free-expression provision equated to federal First Amendment in context of libel action). One of the foremost authorities on state constitutional law has noted:

> To the extent that a state court treats a [United States] Supreme Court opinion as the authoritative, rather than only persuasive, source for interpreting a particular state provision, the state provision becomes essentially superfluous. It follows that such judgments upholding rights, even if nominally based on state grounds, are not based on independent state grounds and are always vulnerable to Supreme Court review.

Friesen, 1 STATE CONSTITUTIONAL LAW § 1-6(b), at 1-44 (footnotes omitted).[26]

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[25] Under *Stone v. Powell*, 428 U.S. 465 (1976), such search and seizure tests will not affect federal habeas corpus cases.

[26] Speaking of the right to effective assistance of *trial* counsel, the Ninth Circuit has noted, without deciding, the question "whether, after *Duncan*, citation of an identical or functionally identical state-law claim is sufficient to present a federal claim." *Peterson*, 319 F.3d at 1160. The *Peterson* court canvassed other appellate decisions, explaining that

> The Supreme Court in *Duncan* left open the question of what happens when the state and federal standards are not merely similar, but are, rather, identical or functionally identical. Several of our sister circuits had held, before

(Continued on following page)

This Court has held that when state courts declare they will "'apply the same analysis in considering . . . state [constitutional] claims as . . . in considering [a] federal [constitutional] claim,'" the Court will "consider a state-court decision as relying upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald v. Racing Association of Central Iowa*, 123 S. Ct. 2156, 2158-2159 (2003) (quoting *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d 555, 558 (Iowa 2002), and citing *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n. 4 (1990) ("no adequate and independent state ground where the court

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Duncan, that presenting a state-law claim that is functionally identical to a federal claim is sufficient to present fairly the federal claim. *See Scarpa v. DuBois*, 38 F.3d 1, 7 (1st Cir.1994) ("[P]resenting a state-law claim that is functionally identical to a federal-law claim suffices to effectuate fair presentment of the latter claim." (citing *Nadworny v. Fair*, 872 F.2d 1093, 1099-1100 (1st Cir.1989))); *Verdin v. O'Leary*, 972 F.2d 1467, 1476 (7th Cir.1992) (holding that when "facts *and* legal theory are the same," presentation of the state claim suffices to present the federal claim and that placing the burden on the petitioner to demonstrate the "clonal relationship" is appropriate); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-1233 (3d Cir.1992) (holding that where the test for insufficiency of evidence is the same under Pennsylvania and federal law, failing to refer to federal law did not foreclose proper exhaustion); *see also Strogov v. Attorney Gen. of N.Y.*, 191 F.3d 188, 192 (2d Cir.1999) (noting the possibility of proper exhaustion if a petitioner raised a federal claim in his habeas petition "functionally equivalent" to a state-law claim presented in state court).

319 F.3d at 1160. At least three district courts have held claims to have been fairly presented in similar circumstances. *See Davis v. Cain*, 44 F. Supp. 2d 792, 795-796 (E.D. La. 1999); *Hakeem v. Beyer*, 774 F. Supp. 276, 283-284 (D.N.J. 1991), *vac'd on other grounds*, 990 F.2d 750 (3d Cir. 1993); *DeBenedictis v. Wainwright*, 517 F. Supp. 1033, 1035-1036 (S.D. Fla. 1981).

says that state and federal constitutional protections are 'identical'") and *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983) ("jurisdiction exists where federal cases are not 'being used only for the purpose of guidance' and instead are 'compel[ing] the right'")). The state acknowledges the parallels between certiorari review of state-court decisions and the law of exhaustion and procedural default, as this Court frequently has done. *See Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979). *See* Pet. Br. at 44 n. 24 (citing 28 U.S.C. § 1257 and *Webb v. Webb*, 451 U.S. 493, 500-501 (1981)).

This Court should not curtail its own appellate, as well as habeas corpus, jurisdiction, by refusing to consider challenges to state court decisions premised on a federal constitutional standard invoked as a matter of state law by the use of a federal term of art. To limit this Court's authority and responsibility to enforce the Sixth Amendment, where the prisoner has complained of "ineffective assistance of counsel," would be to erect a hypertechnical obstacle to litigants who gave the state a full and fair opportunity to correct the constitutional error.

3. Oregon Law Ensured That Mr. Reese Provided the Oregon Appellate Courts an Opportunity to Decide the Federal Claim Decided by the PCR Trial Court.

Mr. Reese gave the Oregon courts a fair opportunity to address his federal constitutional claim of ineffectiveness of appellate counsel by asking the Oregon Court of Appeals and Supreme Court to review the PCR trial-court order denying his claim on a federal ground. The state correctly notes that Mr. Reese's post-conviction appellate filings did not cite the federal Constitution nor any federal cases in regard to his claim. But this is not premise enough for the

conclusion that Mr. Reese failed to "alert," Pet. for Cert. at i, the Oregon courts that it was indeed a federal claim he was making. To reach that conclusion, the state must, ironically, ignore the very policy of respect for state-court procedural rules that undergirds the exhaustion doctrine in the first place.

Again, the way that Mr. Reese alerted the Oregon courts to the federal nature of his claim was by seeking review of the summary affirmance of the PCR trial court's adverse decision of his claim, a decision based solely on federal grounds. However advantageous it might have been as a matter of appellate advocacy, it was unnecessary for Mr. Reese to cite further federal authority to exhaust his claim, because the operation of Oregon law ensured that the Oregon Court of Appeals and Oregon Supreme Court would consider the grounds for decision below. Those grounds were, in turn, so starkly federal that no reviewing court could have mistaken them for state-law grounds.

a. Oregon's PCR Statutes Helped Ensure That Mr. Reese Fairly Presented His State and Federal Constitutional Claim.

Mr. Reese's first amended petition for post-conviction relief claimed that Mr. Reese was being unlawfully confined because, in pertinent part, he "was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon." J.A. 17. The PCR trial court disagreed. Under the heading "Adequate Appellate Counsel," it wrote simply that "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745 (1983)." J.A. 23. This was in keeping with Oregon law, which provides that a

PCR court denying a petition for relief must enter an order "stat[ing] clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. § 138.640. By citing only a federal case, the PCR trial court was explaining that it had "decided" a "federal question" rather than "a state . . . question, or both."

The same Oregon statute that directs PCR trial courts to issue memoranda of opinion further provides that such a memorandum of opinion "shall constitute a final judgment for purposes of appellate review." *Id.* Further, the PCR court's judgment explicitly incorporated its memorandum of opinion, stating that "It is hereby adjudged that, based on the Court's Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed." J.A. 25.

Mr. Reese appealed this final judgment. On appeal, the Oregon Court of Appeals "examine[s] anew the [PCR] court's constitutional determinations." *Davis v. Armenakis*, 151 Or. App. at 69, 948 P.2d at 329. Newly appointed counsel advised Mr. Reese that he would not brief any arguments or any issues for him, but rather that Mr. Reese would be required to file a *Balfour* brief. Mr. Reese did so.

The record does not disclose whether Mr. Reese or his appointed counsel selected Mr. Reese's *pro se* post-conviction petition, rather than the first amended post-conviction petition that was ruled upon by the PCR trial court, as Section B of the *Balfour* brief. Either way, Section B, inserted by Mr. Reese's counsel, contained a claim for relief entitled "Second Claim for Relief: Ineffective Assistance of Appellate Counsel." J.A. 32. Under this claim, Mr. Reese complained that his direct appeal counsel had refused to file a petition for review on direct appeal. *Id.*

Moreover, he continued to insist that his direct appeal counsel had refused to raise valid issues. He argued:

> Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

Id.

The state did not respond to Mr. Reese's PCR appeal by filing a brief of its own, but rather moved for summary affirmance. This triggered Or. Rev. Stat. § 138.660, which provides:

> In reviewing the judgment of the circuit court in a [post-conviction] proceeding . . . the Court of Appeals on its own motion or on motion of respondent may summarily affirm, after submission of the appellant's brief and without submission of the respondent's brief, the judgment on appeal without oral argument if it finds that no substantial question of law is presented by the appeal.

The Court of Appeals granted the state's motion. J.A. 42-43.

The same statute continues by providing that "[a] dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal." Or. Rev. Stat. § 138.660. The Oregon Court of Appeal's decision on the "merits" of the PCR court's "judgment" must therefore have been based on an examination of that judgment, which is to say of the PCR trial court's memorandum of opinion, where the federal nature of Mr. Reese's claim is made plain.

Mr. Reese then filed a petition for review by the Oregon Supreme Court. There, he "contend[ed] that the Court of Appeals decision [was] wrong," J.A. 48, again assigning as error that he was not granted relief despite the fact that he had been prejudiced by "ineffective assistance of . . . appellate court counsel," J.A. 47. To evaluate whether or not the Court of Appeals's decision was "wrong," the Supreme Court must have examined that decision. Seeing that it was a bare order of summary affirmance, the Supreme Court must further have looked to the trial-court judgment it affirmed, which judgment in turn incorporated the memorandum of opinion indicating the federal nature of Mr. Reese's ineffective assistance of appellate counsel claim. This parallels the "look through" doctrine developed by this Court in federal habeas corpus cases to determine whether a state law decision is based on a state procedural ground or on its merits. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991).[27]

That Oregon courts undertake review of this nature is not idle speculation. In its lead case on the preservation of error in a criminal case, the Oregon Supreme Court explained that it had

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[27] The Ninth Circuit may or may not have had *Ylst* somewhere in the back of its mind, as the state suggests that it did, when it decided Mr. Reese's appeal. *See* Pet. Br. at 26-27. Since the Ninth Circuit did not cite *Ylst*, the question raised by the state as to the propriety of the Ninth Circuit's purported reliance on it is at any rate impossible to resolve. Mr. Reese cites *Ylst* not to address how *Ylst* guides federal courts, but rather to illustrate the considerations that most likely guided the Oregon Supreme Court: that "many formulary orders are not meant to convey *anything* as to the reason for decision," and hence that it is safest to presume that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803 (emphasis in original).

> previously drawn attention to the distinctions between raising an *issue* at trial, identifying a *source* for a claimed position, and making a particular *argument*. The first ordinarily is essential, the second less so, the third least . . . [A]n . . . important justification for requiring preservation of claims of error, consistent with the directive to administer justice "completely," Or. Const. Art. I, § 10, is fairness to the adversary parties, and courts can avoid taking parties by surprise by inviting memoranda on inadequately briefed questions. Efficient procedures are instruments for, not obstacles to, deciding the merits, particularly when the alternative is a criminal conviction that lacks a basis in law or in fact.

State v. Hitz, 307 Or. 183, 188-189, 766 P.2d 373, 375-376 (1988) (emphasis in original). As in *Hitz*, "[t]he state was not ambushed or misled or denied an opportunity to meet [Mr. Reese]'s argument in this case." *Id.* at 189, 766 P.2d at 376. Rather, Mr. Reese passed the *Hitz* test with flying colors by not only raising the issue of ineffective assistance but also, in his PCR petition, clearly identifying its federal constitutional source. J.A. 17.

The Ninth Circuit, which is of necessity especially familiar with the details of Oregon appellate procedure, *cf. Granberry v. Greer*, 481 U.S. 129, 136 n. 9 (1987), has had occasion to give a long, reasoned analysis of how the relevant Oregon appellate rules work. That court concluded that the Oregon Supreme Court is an expansive examiner of issues on review. *Wells v. Maass*, 28 F.3d 1005, 1009-1010 (9th Cir. 1994).[28]

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[28] "The Oregon Supreme Court retains the power to address claims which are not raised in the petition for review, and it has exercised this power on multiple occasions." *Wells*, 28 F.3d at 1010.

Consistent with *Granberry's* policy of deferring to circuit courts of appeals' interpretations of their states' appellate procedures, this Court should give deference to the Ninth Circuit's interpretation of Oregon procedures. That court's interpretation explains why Mr. Reese provided the Oregon Supreme Court a fair opportunity to decide his federal constitutional claim of ineffective assistance of appellate counsel.

> We conclude that it is appropriate to presume that, when faced with a summary affirmance from the Oregon Court of Appeals, the Oregon Supreme Court would have read the PCR court's substantive decision. Any other conclusion would not do credit to the appellate review process. For whatever variations may be appropriate under discretionary state procedures, an appellate court cannot fairly review a decision without knowing its content.

Pet. App. 17. Even if the Oregon Supreme Court chose to deny review without reviewing the only written opinion in Mr. Reese's case, comity was served in that case because "that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue." *Id.* at 19.

b. The En Banc Ninth Circuit Has Already Recognized the Narrowness of the Panel's Holding in Mr. Reese's Case.

The state responds to these contentions by arguing that the Ninth Circuit "announced a rule that dramatically departs from the fair presentation requirement" in Mr. Reese's case. Pet. Br. at 17; *see also id.* at 21, 22, 26. To Mr. Reese's knowledge, the only new rule involved in this case is the rule proposed by the state in its brief. Rather, the Ninth Circuit's decision in Mr. Reese's case involved a

strict interpretation of exhaustion and fair presentation law, followed by an exhaustive factual analysis. The court announced no rule.

This conclusion is bolstered by the Ninth Circuit's *en banc* decision in *Peterson*, a decision reached after the panel decision in Mr. Reese's case. The court's analysis demonstrates that *Reese* did not announce a new rule. Rather, the contrast between Mr. Reese's case and Peterson's vividly demonstrates how Mr. Reese fairly presented his federal claim, while Peterson did not.

In *Peterson*, the *en banc* court distinguished Mr. Reese's case from Peterson's, concluding that Peterson had not fairly presented his ineffective assistance of trial counsel claim to the Oregon appellate courts. 319 F.3d at 1157. It based its conclusion on the critical difference between the two cases: whereas in Mr. Reese's case, "the Oregon Supreme Court would have been alerted that the claim for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law," in Peterson's case, "he specifically and exclusively alleged a violation of his right to 'adequate' assistance of counsel under the Oregon Constitution" in his petition for review. *Id.* Therefore, although the Ninth Circuit relied on Oregon Rule of Appellate Procedure 9.20 to hold that Mr. Reese's federal claim was fairly presented, Rule 9.20 "was not enough to alert the Oregon Supreme Court that Peterson was seeking review of the federal issue he had presented to the Oregon Court of Appeals." *Id.*

III. THE STATE HAS ABANDONED ANY DEFENSE THAT MR. REESE FAILED TO PRESENT SUFFICIENT FACTS TO THE OREGON APPELLATE COURTS.

The state argues that Mr. Reese's factual presentation to the Oregon appellate courts was insufficient. Pet. Br. at 42-43. The state did not present such an argument to the

Ninth Circuit, a point it concedes: "[t]he State and the Ninth Circuit have treated the problem in this case primarily as a question whether, in state court, Reese identified his ineffective appellate counsel claim as a federal claim." Pet. Br. at 42, n. 22. Although the state initially defended on this theory in the district court, Reply Memorandum in Response to Petitioner's Amended Petition, Docket No. 38 at 6-8,[29] the state abandoned this aspect of its defense once the Magistrate Judge issued a recommendation in Mr. Reese's favor. The state instead focused its defense on Mr. Reese's failure to "present his ineffective appellate counsel claim as a federal question to Oregon's Court of Appeals because his brief to that court did not even mention the federal constitution or any other body of federal law." Objections to Findings and Recommendations (Amended), Docket No. 54 at 2.[30] Since then, as articulated in the question presented by the state, the focus of this litigation has been on whether Mr. Reese was required to add the word "federal" to his claim of ineffective assistance of appellate counsel in the Oregon Supreme Court. Pet. for Cert. at i.[31]

"Procedural default is normally a 'defense' that the state is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Trest v. Cain*, 522 U.S. 87, 89 (1997) (citing *Gray*, 418 U.S. at 166, and *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980)). The Court made the same point two decades earlier: "in

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[29] Referenced at J. A. 3.

[30] Referenced at J. A. 5.

[31] *See also* Pet. Br. at 41 ("a state prisoner could identify a federal claim through an accepted short-hand reference without expressly identifying the federal constitutional provision, such as 'my federal right to effective counsel'").

some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 124 n. 26 (1982) (citing *Estelle v. Smith*, 451 U.S. 454, 468 n. 12 (1981) and *Jenkins*, 447 U.S. at 234 n. 1). The state did not preserve this aspect of its defense. Rather, it abandoned it by failing to raise it in the Ninth Circuit.

Even if the state had not abandoned this argument, Mr. Reese's factual claim was sufficient to fairly present his claim. The state agrees that "Reese presented a federal claim of ineffective assistance of appellate counsel in the post-conviction trial court." Pet. Br. at 5. In its Ninth Circuit brief, it also agreed that the PCR trial court decided the claim "on a federal ground." Resp. Br. at 20.

In his first amended post-conviction petition, Mr. Reese challenged his direct appeal counsel's failure to "raise issues that had been preserved for appeal." J.A. 17. The PCR trial court denied the claim on the merits, citing *Jones v. Barnes*. J.A. 23. When Mr. Reese appealed, his post-conviction appellate counsel followed the lead of direct appeal counsel by filing a *Balfour* brief. Mr. Reese, left to fend for himself, did his best in his second *Balfour* brief to spell out his claims. He argued that his direct appeal counsel "did fail to raise issues on appeal," denied that he [Mr. Reese] "fail[ed] to raise the issues in my arguments," and asserted that counsel "failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction." J.A. 32.

The state of Oregon should not gain an advantage as a result of its *Balfour* system, a system found unconstitutional by the Magistrate Judge before and after this Court's decision in *Smith v. Robbins*. Pet. Supp. App. at 18; Pet. Supp. App. at 47-48. Under *Balfour*, direct appeal and post-conviction appeal counsel can refuse to present any arguments on an inmate's behalf without moving to

withdraw and without identifying any potential issues for review. Pet. Supp. App. at 42. The inmate then must, on short notice, attempt to present legal arguments. No one determines whether the lawyer should be permitted to do this. There is no independent review of the record by the appellate courts. *Id*; *cf. Smith v. Robbins*, 528 U.S. at 282-283.

In reversing the district court's determination that Mr. Reese did not properly exhaust his state remedies, the Ninth Circuit found it unnecessary to review the constitutionality of the *Balfour* system. Pet. App. at 8 n. 6. This Court need not do so, either. In setting out the parameters of fair presentation, however, the Court should require states to provide a fair system to inmates to enable them to fairly present their federal issues to the state courts. It should further acknowledge that Oregon's system contains a fatal flaw when the issue in dispute is effective assistance of appellate counsel.

First, the system encourages ineffective assistance on direct appeal by allowing counsel, by simply claiming the "appeal is frivolous," to simply refuse to present any argument on behalf of the client. Pet. Supp. App. 42. Second, it fails to protect the inmate's federal constitutional right to counsel, because the direct appeal court does not review counsel's determination. *Id.* Moreover, the direct appeal court does not independently review the record – a record of a mere 25 pages in Mr. Reese's case. Such a review would have disclosed that Mr. Reese was initially sentenced *in absentia* and then resentenced without counsel and without warnings of the dangers of self-representation.[32] Third, it permits the identical

[32] *See* recap of sentencing proceedings at 2, *supra*.

process to repeat itself when, as here, the PCR appeal lawyer is permitted to thrust a second *Balfour* brief on the inmate, again with no checks and balances.[33]

In sum, Mr. Reese raised his claim under both the state and federal Constitutions. The PCR court decided the claim on federal grounds only. Thereafter, in his *Balfour* brief and petition for review, Mr. Reese realleged the identical claim – that he had received ineffective assistance of appellate counsel. Unlike Peterson, Mr. Reese never reasserted any state constitutional violation. Rather, he challenged the ruling of the PCR trial court, a ruling made solely on federal grounds. He thereby exhausted his claim.

IV. NO NEW RULE IS REQUIRED TO DECIDE MR. REESE'S CLAIM.

If this Court meant its *dicta* in *Duncan* to be the law, it need only say as much. It need not craft a new rule – the one proposed by the state, the one proposed by the Criminal Justice Legal Foundation (CJLF), or any other. If the Court chooses to reaffirm its *Duncan* decision or chooses to craft a new rule, it should nevertheless recognize that there are situations in which state courts are fairly presented with federal claims, even when the petitioner does not specifically refer to the constitutional guarantee.

Numerous considerations caution against a new rule. Every new rule, however straightforward, exacts its price in a flurry of increased litigation. The changes to federal

[33] "A comparison between Oregon's procedure under *Balfour* and those previously considered by the United States Supreme Court, particularly California's *Wende* procedure at issue in *Smith*, demonstrates that Oregon's *Balfour* procedure does not afford adequate and effective appellate review for criminal indigents." Pet. Supp. App. 47.

habeas law wrought by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, 110 Stat. 1214, for example, have generated eighteen cases in seven years in this Court alone (some of which, of course, have addressed multiple significant AEDPA questions), not to mention countless lower court decisions.[34]

[34] *See Felker v. Turpin*, 518 U.S. 651 (1996) (effect of the AEDPA on the power of this Court to grant an original writ of habeas corpus, whether the AEDPA is an unconstitutional restriction on the jurisdiction of this Court, and whether the AEDPA is a suspension of the writ in contravention of Art. I, § 9, cl. 2 of the Constitution); *Artuz v. Bennett*, 531 U.S. 4 (2000), *Duncan v. Walker*, 533 U.S. 167 (2001), *Carey v. Saffold*, 536 U.S. 214 (2002) (addition of statute of limitations to 28 U.S.C. § 2244, *see* AEDPA § 101, 110 Stat. at 1217); *Clay v. United States*, 537 U.S. 522 (2003) (addition of statute of limitations to 28 U.S.C. § 2255, *see* AEDPA § 105, 110 Stat. at 1220); *Hohn v. United States*, 524 U.S. 236 (1998), *Slack v. McDaniel*, 529 U.S. 473 (2000), *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (changes in 28 U.S.C. § 2253 regarding certificates of appealability, *see* AEDPA § 102, 110 Stat. at 1217-1218); *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000), *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003) (new standard of review in 28 U.S.C. § 2254(d), *see* AEDPA § 104(3), 110 Stat. at 1219); *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000) (new provision on effect of failure to develop facts in state proceedings in 28 U.S.C. § 2254(e)(2), *see* AEDPA § 104(4), 110 Stat. at 1219); *Felker*, 518 U.S. 651, *Calderon v. Thompson*, 523 U.S. 538 (1998), *Slack*, 529 U.S. 473, *Tyler v. Cain*, 533 U.S. 656 (2001) (new limitations on second or successive applications for habeas relief in 28 U.S.C. § 2244(b), *see* AEDPA § 106(b), 110 Stat. at 1220); and *Lindh v. Murphy*, 521 U.S. 320 (1997), *Woodford v. Garceau*, 123 S. Ct. 1398 (2003) (applicability of AEDPA to various classes of cases based on when the cases were filed). Yet another AEDPA case is now pending in this Court. *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 993 (2003) (When a lower court recharacterizes a federal prisoner's post-conviction motion as a § 2255 petition, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive" petition for AEDPA purposes?).

Moreover, contrary to the state's assertion, a new rule will not benefit state prisoners. Pet. Br. at 39. Despite the Court's best attempts to keep habeas corpus law simple and straightforward, that is no longer possible. Habeas corpus law is complex.

> Although the question, like the majority's opinion, is written with clarity, few lawyers, let alone unrepresented state prisoners, will readily understand it. The reason lies in the complexity of this Court's habeas corpus jurisprudence – a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure. Today's decision unnecessarily adds to that complexity.

Edwards, 529 U.S. at 454 (Breyer, J., concurring). This conclusion is bolstered by the CJLF's amicus brief, which expends thirty pages attempting to capture the complex interplay between the exhaustion and procedural default rules and proposing a six-pronged rule of its own. CJLF Br. at 28-29.

The best evidence that habeas corpus law is complex is the fact that most prisoners and their lawyers cannot figure out how to comply with it. Although a large number of exhaustion questions may come before the courts, undoubtedly the vast majority of those claims are lost by inmates. They are not lost because prisoners and their counsel can count on sympathetic habeas corpus principles to allow them to proceed through the courts, absent deliberate bypass.[35] Those days are long gone. Prisoners do not intentionally fail to exhaust their state remedies. Rather, prisoners and their counsel, wary of many perceived traps, simply cannot avoid them. Whether the

[35] *See Fay v. Noia*, 372 U.S. 391 (1963), overruled by *Coleman*.

prisoners and their counsel can eventually catch up on the learning curve to grasp the procedural complexities of habeas corpus practice, any changes in the present law will make it that much more difficult for prisoners to grasp and comply with it, whether the rule on its face seems simple or not.[36]

[36] The Court should not consider this question in a vacuum. Rather, it should take into account the differences between the state and defense bars. In Oregon, for example, cases are prosecuted by local district attorneys' offices. After that point, all state and federal litigation is prosecuted by one central agency, the Oregon Department of Justice. One office litigates state court appeals, state post-conviction trials and appeals, and federal habeas corpus cases. In contrast, there is a clear separation in the defense bar for federal and state court practice. Local public defenders, contractors, and private counsel defend cases at the trial level. Indigent direct appellants then go through the Office of the State Public Defender. If the direct appeal is unsuccessful, a private practitioner, usually a state contractor, is appointed to assist with the post-conviction litigation. If that is unsuccessful, in most instances, a different private practitioner or contractor is appointed to assist with appellate litigation. If that litigation is unsuccessful, the prisoner himself is required to file a *pro se* federal habeas corpus petition, after which, in most instances, the Federal Public Defender is appointed to represent the petitioner. This decentralization of the defense bar puts it at a grave disadvantage with respect to exhaustion of state remedies – so much so that an Oregon State Bar Task Force recently found that "no remedy short of a statewide entity" will correct the problem and recommended "the model of the centralized unit that currently exists within the Oregon Department of Justice" to solve the problem. *See* Oregon State Bar Indigent Defense Task Force III Report at 16 (May 22, 2000 and January 12, 2001) (available at http://www.osbar/2practice/idtf3/intro.html (accessed August 6, 2003)). The lawyers conducting state court trials, appeals, and post-conviction matters do not handle habeas corpus litigation. Although it might seem reasonable that these lawyers should learn how to preserve their clients' federal claims, the reality that they do not is disclosed by the numerous exhaustion cases lost by petitioners day in and day out in the federal courts.

Finally, there is no "significant social cost of concern to the States" in this case. Pet. Br. at 37. According to the state:

> Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Id. These societal costs are not at risk here. Mr. Reese is only seeking a new state-court appeal, not from the results of his trial, but from the results of his third sentencing. If he is successful in convincing this Court to affirm the Ninth Circuit's ruling, he will first be required to win his appeal before he can obtain a fourth sentencing. Then, if he can convince the trial court to sentence him as previously ordered by the Oregon Court of Appeals, to a 121-130-month presumptive sentence, he will be required to face an additional hurdle, the Board of Pardons and Parole. If the Board is then convinced he is releasable, he will be released to post-prison supervision. Because more than 130 months have already passed since his initial sentencing, he will hardly receive a windfall if he prevails.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 14th day of August, 2003.

DENNIS N. BALSKE
Attorney for Respondent

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No. 02-964

In the Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
*MARY H. WILLIAMS
Solicitor General
JANET A. KLAPSTEIN
ROBERT B. ROCKLIN
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

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REPLY BRIEF FOR PETITIONER

Reese argues, as he must, that he fairly presented to Oregon's highest court a federal constitutional claim of ineffective assistance of appellate counsel, even though he cited no authority as the legal basis of his claim. Reese seizes on the State's acknowledgment that, in certain narrow circumstances, a state prisoner necessarily identifies a federal issue even without citing federal authority.[1] Expanding from this, Reese argues that a state prisoner can alert a State's highest court to the federal nature of his claim if (1) he phrases his claim in terms associated only with federal rather than state constitutional claims; or (2) the state courts apply the same legal analysis in deciding the claim under either the state or federal constitution; or (3) state law requires the state appellate court to address issues not actually presented by the petitioner. The State disagrees that a state prisoner would satisfy the fair presentation requirement by complying with Reese's second proposed option. Although Reese's first and third options *might* satisfy the fair presentation requirement in certain circumstances, those circumstances are not present in this case.

I. The phrase "ineffective assistance of counsel" is not a legal term of art that necessarily identifies a federal claim for the Oregon appellate courts; therefore, Reese did not alert the state courts that he was raising a federal claim.

Reese argues that he alerted the Oregon appellate courts to the federal nature of his claim by using the phrase "ineffective assistance of counsel." Brief of Respondent at 27–29. As the

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[1] The example the State gave was that a "due process claim" in Oregon courts would necessarily be a federal claim because the Oregon Constitution does not contain a due process clause.

State noted in its opening brief, Oregon courts often refer to "inadequate assistance of counsel" instead of "ineffective assistance of counsel" because the Oregon Supreme Court has stated that, under state constitutional principles, "the term 'adequate' assistance of counsel may be more accurate than 'effective' assistance of counsel." Brief of Petitioner at 4 n. 5 (*quoting Krummacher v. Gierloff*, 290 Or. 867, 872 n. 3, 627 P.2d 458, 462 n. 3 (1981)). Reese asserts that he fairly presented the federal nature of his claim to the state appellate courts because he "referred to his claim almost exclusively as a claim of 'ineffective,' not 'inadequate,' assistance."[2] Brief of Respondent at 29.

Although the Oregon Supreme Court may have expressed a preference for the phrase "inadequate assistance of counsel" under the state constitution, it has not transformed that phrase into a legal term of art nor does it treat the phrase "ineffective assistance of counsel" as denoting a claim arising only under the federal constitution. Rather, practitioners and judges alike

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[2] The Ninth Circuit recently took Reese's argument one step further. Although only the Oregon Supreme Court has expressed a preference for the use of the phrase "inadequate assistance of counsel" when referring to claims under the Oregon Constitution, the Ninth Circuit held that a state prisoner had fairly presented a federal claim to the *Washington* state courts because he "consistently and exclusively" mentioned ineffective assistance of counsel. *Sanders v. Ryder*, ___ F.3d ___, ___ (9th Cir. 2003) (2003 WL 22053440). Thus, the Ninth Circuit apparently believes "ineffective assistance of counsel" is a term of art designating a federal claim, not only for Oregon courts, but for all courts in that circuit. *Sanders* demonstrates the problems that inevitably arise each time courts are permitted to move away from a hard-and-fast rule that state prisoners must cite the federal constitutional provision or a leading federal case to establish that they fairly presented a federal claim to the state courts.

often use the phrases interchangeably. For example, in *Lichau v. Baldwin*, 166 Or. App. 411, 415, 999 P.2d 1207, 1210 (2000), the Oregon Court of Appeals wrote:

> Petitioner filed a petition for post-conviction relief alleging multiple grounds of trial court error, prosecutorial misconduct, and *inadequate* assistance of counsel. In support of the *ineffective* assistance of counsel claim, petitioner alleged that trial counsel failed to conduct an adequate investigation of his alibi defense.

(Emphasis added); *see also Hempel v. Palmateer*, 187 Or. App. 70, 75, 66 P.3d 513, 515 (2003) ("Petitioner's federal inadequate assistance claim fails for the same reasons that his state claim fails.").

Reese himself used the terms interchangeably before the state appellate courts.[3] Thus there simply is no support for Reese's argument that the Oregon appellate courts must have treated Reese's reference to "ineffective assistance of counsel" as necessarily raising a federal claim.

But even more troubling than Reese's unsupported description of Oregon law is the broader implication his rule would have for all federal habeas litigation. To hold that the exhaustion requirement is satisfied by referring to a claim "almost exclusively" in language that *may* constitute a term of art will increase litigation in federal habeas corpus proceedings on this issue and on other federal claims that have state-

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[3] Even before this Court, Reese does not treat the phrase "ineffective assistance of counsel" as a term of art reserved for the federal constitution. For example, see Brief of Respondent at 29; in the heading on that page, Reese uses the term "ineffective" when referring to both the state and federal constitutions.

court analogs. Whether a given word or phrase is a term of art for the state courts and whether a state prisoner who used that word or phrase almost—but not quite—exclusively fairly presented a federal claim to the state courts makes a guessing game of the federal habeas corpus proceedings. As the State pointed out in its opening brief, the potential for wasting resources litigating procedural default issues is a legitimate concern for this Court in explaining the requirements of exhaustion of state remedies through fair presentation of claims in the state courts. Rejecting Reese's novel "term of art" principle is one way to ensure a more efficient use of those limited resources.

II. Even if a state court applies the same legal analysis to similar claims raised under the state and federal constitutions, a state prisoner still must make it clear to the state court that he is raising a federal claim.

Reese argues that, because the state courts would have applied the same test for a claim of ineffective assistance of appellate counsel under either the Oregon or United States Constitutions, he should be deemed to have provided the state appellate courts with sufficient opportunity to consider a claim under the federal constitution. Brief of Respondent at 29–35. Effectively, Reese wants to benefit from his own failure to refer explicitly to either constitution.

There are at least four problems with Reese's argument. First, even when state courts analyze an issue under the state constitution in the same way they analyze a related issue under the federal constitution, it is critical first to identify for the state court the source of the claim because that source defines the authority of the state court. This is especially true for the state's highest appellate court, which is free to modify its analysis under the state constitution, but is bound by this Court's decisions concerning the federal constitution.

Thus, for example, even if the Oregon Supreme Court currently applies the same analytical process and standards for resolving state and federal claims of ineffective (or inadequate) assistance of appellate counsel, that may not always be the case. The Oregon Supreme Court frequently has diverged in its interpretation of the state constitution from this Court's interpretation of similar provisions under the federal constitution. *See, e.g., State v. Moore*, 334 Or. 328, 331, 49 P.3d 785, 787 (2002) (rejecting state's suggestion that the court reexamine and discard the "unavailability" requirement under Article I, section 11, of the Oregon constitution in light of changes in this Court's analysis of Confrontation Clause claims); *State v. Tanner*, 304 Or. 312, 315–316, 745 P.2d 757, 758–759 (1987) (rejecting federal analysis of exclusionary rule based on deterrence rationale; under the state constitution the exclusionary rule is predicated on an individual's privacy rights); *State v. Smith*, 301 Or 681, 725 P.2d 894 (1986) (right against compelled self-incrimination differs under state and federal constitutions). In fact, the Oregon Supreme Court recently has emphasized its willingness to reexamine any prior state constitutional decision when presented with a principled argument demonstrating that the challenged decision was inconsistent with the court's template for constitutional construction. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 53–54, 11 P.3d 228, 237 (2000) (inviting parties to suggest new analyses); *Storm v. McClung*, 334 Or. 210, 222–223, 47 P.3d 476, 482 (2002) (reconsidering prior interpretation of Article I, section 10, of the Oregon constitution).

Although the Oregon appellate courts currently may follow the same analysis in addressing ineffective assistance of counsel claims brought under either the state or federal constitutions, they do not, as Reese suggests, simply merge the state claim into the federal claim. Nor do they treat the state claims as controlled by federal case law. Instead, when claims are raised under both constitutions, the state courts

raised under both constitutions, the state courts treat each claim separately and they analyze the state constitutional claims under the state constitution and the case law addressing the state constitution. *See, e.g., Lichau v. Baldwin*, 333 Or. 350, 358–359, 39 P.3d 851, 856 (2002) (following court's methodology of addressing claims under the state constitution before addressing similar claims under the federal constitution; the court expressly declined to reach the federal claim after first addressing the state claim); *Hempel v. Palmateer*, *supra*, 187 Or. App. at 73–75, 66 P.3d at 514–15 (2003) (same for claim of inadequate assistance of appellate counsel).

A second problem with Reese's argument is that it improperly shifts the focus away from what the state prisoner must do to alert the state courts to a federal claim and, instead, focuses on what the state courts may do even when the state prisoner fails to alert them to a federal claim. As the State discussed at some length in its opening brief, the Ninth Circuit similarly transformed the fair presentation requirement from an obligation of the state prisoner to an obligation of the state courts. The Ninth Circuit's transformation finds no support in the Court's case law; neither does the transformation Reese now urges. If all that matters for fair presentation is what the state courts did (or could have done) in analyzing a claim, a state prisoner could exhaust a federal claim in state court by relying exclusively on the state constitution as the only basis for relief. Even the Ninth Circuit has refused to expand the fair presentation requirement that far. *Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc).

The third problem for Reese is that his first two options for meeting the fair presentation requirement are inconsistent. If, as he asserts, the state courts use the federal analysis whether appellate counsel's performance is challenged under the state or federal constitution or both, it is unlikely that the

state courts would use a distinct term ("inadequate") to refer to assistance of counsel claims under the state constitution. The only reason for the Oregon Supreme Court to suggest a preference for a different term under the state constitution is because the state appellate courts treat the state and federal claims as distinct and independent claims.

Moreover, if the Court accepts Reese's argument that the state courts use the same test for both state and federal claims, the Court must reject Reese's primary argument that, simply by reading the post-conviction trial court's memorandum opinion, the state appellate courts would necessarily have known that Reese's appeal involved a federal claim. The post-conviction trial court's citation to a federal case would not necessarily mean that the court decided a federal question. The court could just as easily have been resolving only the state constitutional issue or both the state and federal issues and the citation to a federal case could never alert the state appellate courts that Reese was pursuing only his federal constitutional claim on appeal.

III. Oregon courts—like most appellate courts—address only the claims that litigants present to them. Nothing in Oregon law required the state appellate courts to address an issue that Reese did not raise clearly as a claim of error.

Reese argues that certain procedural aspects of Oregon law governing post-conviction trial court decisions and summary affirmance in the Oregon Court of Appeals necessarily mean that the state appellate courts were alerted to the federal source of Reese's claim. Brief of Respondent at 35–39. The State touched on this argument in its opening brief. Brief of Petitioner at 29–30 n. 13. A few additional comments are warranted in response to Reese's argument. First, the summary affirmance statute does not alter the general requirement that appellants properly must present issues they want the appel-

late court to consider. Although Or. Rev. Stat. § 138.660 permits the Oregon Court of Appeals to summarily affirm, it focuses on whether any "substantial question of law is *presented by the appeal*." (Emphasis added). The Oregon Court of Appeals does not consider the merits of an issue never presented properly in the appeal. Nor does the fact that the decision to summarily affirm is described as "a decision upon the merits of the appeal," Or. Rev. Stat. § 138.660, change the basic appellate requirements for raising claims. Instead, in enacting that provision, the legislature merely confirmed that the losing party could petition for review by the Oregon Supreme Court on the merits of the appeal instead of simply on the decision to summarily affirm. The statute does not transform the intermediate appellate court's decision into one that encompasses issues that no party ever properly raised.

Nor is it necessary, as Reese asserts, for the Oregon Supreme Court to examine the merits of the post-conviction trial court judgment in order to address the petition for review. To the contrary, that court may deny a petition for review when it identifies, simply by examining the petition for review itself, no colorable issues for the court to address. A petition seeking review of an order of summary affirmance is no different in this regard than a petition from an unwritten decision of the Oregon Court of Appeals. Certainly, Reese offers nothing to support his assertion that the Oregon Supreme Court must have looked through the Oregon Court of Appeals' decision and back to the memorandum opinion of the post-conviction trial court when it denied his petition for review.

The only support Reese offers for this argument is based on his apparent misunderstanding of the requirements for preserving error. Brief of Respondent at 39–40. Preservation requirements are distinct from the party's obligation to properly frame an issue for appellate court review. State appellate courts have consistently refused to address inadequately pre-

sented claims on appeal, even when those claims were adequately preserved in the trial court. *See* Brief of Petitioner at 28–31.

IV. The State has not abandoned its concern that the factual basis for Reese's inadequate assistance of counsel claim has changed throughout the various proceedings.

Throughout his brief, Reese presumes that he raised or attempted to raise only a single ineffective-appellate-counsel claim in the state post-conviction and federal habeas corpus proceedings.[4] When the factual allegations shift during the proceedings from multiple factual complaints to undefined allegations to newly raised factual issues, an ineffective-appellate-counsel claim cannot be treated as a single claim.

In the amended petition Reese's counsel filed with the post-conviction trial court, he claimed his appellate counsel on the direct appeal was ineffective for: (1) failing to withdraw as Reese's attorney due to conflict of interest; (2) failing to notify Reese of change of counsel for his case; (3) failing to

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[4] *See, e.g.*, Brief for Respondent at 4 ("Counsel filed a first amended formal PCR petition raising the claim of ineffective assistance of appellate counsel * * *."); 5 (Reese's PCR brief in the Oregon Court of Appeals "did not explicitly cite to federal authority for the ineffective assistance of appellate counsel claim * * *."); 7 (discussing the Magistrate Judge's ruling that Reese "had fairly presented his claim of ineffective assistance of appellate counsel."); 12 (Reese "raised his federal constitutional claim of ineffective assistance of appellate counsel in a petition for post-conviction relief" and "fairly presented the substance of his ineffective assistance claim" in the State appellate courts); 14 (Reese "raised every claim he had made in the Oregon Court of Appeals before the Oregon Supreme Court, including the claim of ineffective assistance of appellate counsel.").

raise unspecified issues that had been preserved for appeal; (4) failing to file a timely notice of appeal; and (5) failing to obtain trial transcripts in a timely manner. J.A. 17. The post-conviction trial court's ruling ("Appellate counsel need not present every colorable issue.") apparently addressed only the third claim. J.A. 23.

In the post-conviction appeal to the Oregon Court of Appeals, Reese pursued the fourth claim (attorney failed to file a timely petition for review in the Oregon Supreme Court), and the third claim (attorney failed to raise issues), still without specifying the issues that Reese thought counsel should have raised ("Barton did fail to raise issues on appeal."). J.A. 32. In his petition for review of the post-conviction decision in the Oregon Supreme Court, Reese simply alleged "inadequate assistance of appellate counsel." J.A. 47–48.

In his federal habeas corpus petition, Reese alleged four ineffective-appellate-counsel claims for failing to raise any issues, failing to raise two still-unidentified legal issues, failing to withdraw, and failing to exhaust state remedies by refusing to file a petition for review in the Oregon Supreme Court. *See* Supp. App. to Pet. for Cert. 5. The claim Reese most vigorously pursued—and the centerpiece of this case in the district court—was that his appellate counsel was ineffective for filing a *Balfour* brief and for not identifying any meritorious issues to raise in the direct appeal. Thus, for the first time in the process, the case became focused on a claim that appellate counsel provided ineffective assistance by complying with the *Balfour* process. *See* Supp. App. to Pet. for Cert. 13–18.

To demonstrate that he exhausted his available state-court remedies, Reese must show that he raised—at each level of the state courts—the specific claim he now wants to pursue in federal habeas corpus: that his appellate counsel on direct appeal was ineffective under the federal constitution because he

filed a *Balfour* brief. It is not enough for a state prisoner to argue in the state courts that his appellate counsel was ineffective for failing to file a petition for review and then to argue in federal habeas corpus that his counsel was ineffective for failing to raise a particular issue. Although the State has focused on Reese's failure to identify a federal source for his specific claim, the state has not, as Reese argues, abandoned all objections to the inadequate presentation of the factual basis of his inadequate assistance of appellate counsel claim. See Brief of Respondent at 42–43. To determine whether Reese properly alerted the state appellate courts to the federal nature of his claim, the Court must first focus on the precise boundaries of that claim.

V. Some additional points warrant a brief response.

First, Reese inaccurately describes the Oregon Supreme Court's review of issues not raised in a petition for review. Brief of Respondent at 40 and n. 25. Although the Ninth Circuit has stated that the Oregon Supreme Court "retains the power to address claims which are not raised in the petition for review," *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994), the state court, in fact, applies that practice to cases in which it has allowed review and the court deems it necessary to address an issue in order to reach the issues properly presented to the court. *See* Oregon Rule of Appellate Procedure 9.20(2);[5] *Stupek v. Wyle Laboratories Corp.*, 327 Or. 433,

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[5] Oregon Rule of Appellate Procedure 9.20(2) provides:

> If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not ad-

437, 963 P.2d 678, 680 (1998) (under Oregon Rule of Appellate Procedure 9.20(2), court may consider issue not presented on review, that was properly raised on appeal and preserved below, but court "ordinarily will not do so unless the issue requires resolution"); *State v. Castrejon*, 317 Or. 202, 211–212, 856 P.2d 616, 622 (1993) (explaining scope of court's discretion under the rule); *see also* Oregon Rule of Appellate Procedure 9.17(2)(b)(i) (prohibiting a party from addressing issues not raised in the petition for review itself or changing the substance of the questions presented in a petition for review).[6]

Second, Reese asserts that, in a subsequent case, the Ninth Circuit has narrowed the holding in this case. Brief of Respondent at 41–42. To the extent that it matters to the Court's consideration, the Ninth Circuit continues to reach inconsistent results in this area by speculating on what the state appellate courts might have done when presented with an incomplete or inadequate claim of error. *See Lounsbury v. Thompson*, ___ F.3d ___, ___ (9th Cir. 2003) (WL 21993253) (a state

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dress each such question. The court may consider other issues that were before the Court of Appeals.

[6] Oregon Rule of Appellate Procedure 9.17(2)(b)(i) provides:

> (b) The brief on the merits of the petitioner on review shall contain:
>
> (i) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established. The questions should not be argumentative or repetitious. The phrasing of the questions need not be identical with any statement of questions presented in the petition for review, but the brief may not raise additional questions or change the substance of the questions already presented.

prisoner fairly presents to the state court a substantive claim that he was incompetent to proceed to trial when he limits his state court appeal to solely a procedural competency challenge because the state appellate court would probably have examined the substantive claim to determine whether the alleged procedural defect was harmful).

Finally, Reese argues that the Court should not attempt to clarify the rule for proper exhaustion even though Reese agrees the issue is complex and there is disagreement between and within the federal appellate courts. Reese asserts that clarifying the requirements will only add to the complexity. Brief of Respondent at 46–50. Contrary to Reese's assertion, the State emphasizes that it is not asking the Court to announce a new rule for fair presentation of claims in state courts. Instead, the State urges the Court to clarify in plain terms what it has said before: it is the obligation of state prisoners to fairly present their federal claims in state court by giving the state court a fair opportunity to consider and resolve those federal claims. The State is confident that, instead of adding to the complexity and confusion, the Court can simplify the requirements for "fair presentation" consistent with the purpose underlying that requirement. In doing so, the Court will benefit state prisoners by minimizing the traps for the unwary. And it will reduce the costs incurred by the States and the federal courts in repeatedly litigating the question of procedural default.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition for Certiorari and in the Brief of Petitioner, the Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. KLAPSTEIN
ROBERT B. ROCKLIN
Assistant Attorneys General
Counsel for Petitioner

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No. 02-964

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, NEBRASKA, TEXAS, OHIO, WEST VIRGINIA, ALABAMA, UTAH, SOUTH DAKOTA, WYOMING, DELAWARE, PENNSYLVANIA, NORTH DAKOTA, OKLAHOMA, MONTANA, COLORADO, MAINE, WASHINGTON, CALIFORNIA, NEVADA and VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEPHEN R. CARTER
Attorney General Of Indiana
**GARY DAMON SECREST*
Chief Counsel and
Deputy Attorney General
Counsel of Record
Office of the Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
(317) 232-6315

**Counsel of Record for Amici Curiae*

(Additional Counsel Listed on Inside Cover)

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

LAWRENCE E. LONG
Attorney General of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

JIM PETRO
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, OH 43215

WILLIAM H. PRYOR, JR.
Attorney General of Alabama
State House
11 South Union Street
Montgomery, AL 36130

MATT McNAIR
Attorney General of Nebraska
State Capitol
Lincoln, NE 68509

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 North Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105-4894

G. STEVEN ROWE
Attorney General of Maine
State House Station 6
Augusta, ME 04333

MIKE McGRATH
Attorney General of Montana
215 N. Sanders, PO Box 201401
Helena, MT 59620-1401

WILLIAM SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

BILL LOCKYER
Attorney General of California
1300 I Street, Suite 125
P.O. Box 94244-2550
Sacramento, CA 94244-2550

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

M. JANE BRADY
Attorney General of Delaware
820 North French Street
Wilmington, DE 19801

PATRICK J. CRANK
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002

WAYNE STENEHJEM
Attorney General of
North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-0040

D. MICHAEL FISHER
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

CHRISTINE GREGOIRE
Attorney General of
Washington
1125 Washington Street SE
Olympia, WA 98504-0100

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street, 7th Floor
Denver, CO 80203

BRIAN SANDOVAL
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701-4717

QUESTION PRESENTED

By statute and the Court's case law, a state prisoner must exhaust available state court remedies on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. The Court has held that exhaustion requires a state prisoner to fairly present his claim to the state's highest court and that fair presentment requires the prisoner to have alerted the state court that the claim is a federal one.

Does a state prisoner "alert" the State's highest court that he is raising a federal claim when—in that court—he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim is federal in nature?

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INTERESTS OF THE AMICI

The *Amici Curiae* states devote considerable resources to defending state court judgments in federal habeas corpus actions. Most federal habeas petitions present questions of exhaustion of state court remedies and procedural default for failure to fairly present federal questions in state courts. 6 Wayne R. LaFave *et al.*, *Criminal Procedure* § 28.5(a) (2d ed.) (2003 Pocket Part) (citing a 1995 Department of Justice study). This case presents the important question of what quality of presentment is necessary to exhaust an issue in state court. The resolution of this question will affect the *Amici* states' interests in the fair and efficient resolution of federal habeas proceedings, the protection of state court judgments, and the efficient and effective use of state government resources.

SUMMARY OF THE ARGUMENT

I. Oregon's proposal properly respects state court procedural rules that are designed to facilitate appellate review. The Ninth Circuit's test violates the respect due to state court procedures by ignoring the rules that bind state appellate courts' consideration of claims. Consequently, federal habeas courts allow state prisoners to litigate federal claims that were not properly before the state appellate courts. Such a test flies in the face of the comity concerns long respected by the Court.

II. Oregon's proposal accounts for the fact that many claims have dual bases in both federal and state law. An express facial presentment rule, such as Oregon suggests, respects distinct state law claims that are analogous to, but methodologically different from, federal claims. Many states grant protections to defendants that are greater than, or different from, similar federal protections. Those states require defendants to differentiate federal claims from analogous state law claims that defendants wish the state court to resolve. Without an explicit, facial exhaustion test, federal habeas courts increasingly fail to respect the

analogous state law grounds that state courts identify and resolve.

III. An explicit facial presentation rule addresses the substantial interest of the Amici states in conserving the limited resources available to state government attorneys. Without Oregon's proposed test, state government appellate attorneys are forced to comb the record to identify and counter potential federal claims to help preserve state courts' ultimate dispositions. If the Court adopts Oregon's test, state government attorneys who defend state court judgments in federal habeas court will dedicate less of their time to litigating exhaustion and fair presentment questions and instead focus their valuable and limited resources on the merits of claims. State prisoners and federal habeas courts will similarly benefit from such a rule.

ARGUMENT

I. Permitting federal claims to spring forth in federal habeas proceedings without prior express presentation to state courts undermines state court procedural rules.

Federal courts must respect the role that state court procedural rules play in the criminal justice system. Those rules facilitate review, not hinder it. *Reed v. Ross*, 468 U.S. 1, 10 (1984) (state court procedural rules facilitate the complex criminal justice system and channel the resolution of claims in a fair and efficient manner). So too should the rules governing exhaustion and fair presentment in federal habeas cases. If the exhaustion and fair presentment requirements did not respect state court procedural rules, the federal habeas apparatus would undermine the ability of state courts to control their own proceedings. *Id.* at 11. "[I]n some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Id.* (quoting *Francis v. Henderson*, 425 U.S. 536, 539 (1976)). Indeed, the Court has long recognized the valid role that state

court procedural rules play in fair presentment. *Coleman v. Thompson*, 489 U.S. 346, 349-51 (1991) (failure to comply with state court procedural rules results in procedural default in federal habeas); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (exhaustion not satisfied by presenting a claim to a state appellate court in a procedural context where the merits cannot normally be considered); s*ee also Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam) (a state court cannot be faulted by federal courts for constraining its analysis of a claim to state law when no federal claim was raised).

The Ninth Circuit's "fair opportunity" test, which allows for exhaustion of state remedies where a federal basis for a claim is not asserted to the state appellate courts so long as the prisoner alleged sufficient facts to the appellate court and the trial court addressed the federal issue below, fails to accord the proper respect to state court procedures. The purpose of exhaustion and fair presentment is to respect the state courts and their judgments, not to facilitate easier access to federal habeas review. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Ex parte Royall*, 117 U.S. 241, 251-52 (1886). "Fair" presentment necessarily implies that prisoners have a duty to comply with state court procedural rules so the state courts can address the merits of the prisoners' claims. Comity places a similar burden on federal courts: state court procedural rules must be respected. *Coleman*, 489 U.S. at 351. When federal courts disrespect those rules they cause "significant harm" to the States. *Id.* at 349.

The "fair opportunity" test used by the Ninth Circuit looks not at what the habeas petitioner actually argued to the state courts, but rather focuses on whether a state court could have fashioned a federal claim if they willed it. Such a policy presents a "Catch-22" for state courts. Most, if not all, state courts are limited to considering only those issues presented by the parties. State courts are constrained by their state's law. That is exactly what the Oregon Court of Appeals did in this case.

Yet if the Ninth Circuit's "fair opportunity" test is adopted by the Court, state court procedural rules will be disrespected by federal habeas courts. State courts will be forced to ignore their own facial presentation rules in the interest of satisfying the expectations of federal habeas courts. It would be irrelevant whether a prisoner specifically and facially asserted federal claims in her state appellate briefs so long as the prisoner gave the state appellate courts an "opportunity" to address a federal claim addressed by the trial court. State courts will be forced to choose between their own procedural law and the will of the federal courts. A state court will violate its own law should it sift the record for any potential federal claims in an effort to ensure proper respect is accorded to its judgment. But should a state court abide by its duty to follow the law, federal courts will accord little respect to the state court's judgment. Either situation flies in the face of the purpose of exhaustion and the principles of comity that federal courts have traditionally accorded their state counterparts.

Moreover, the Ninth Circuit's rule is self-defeating. There is no need for a full and fair presentment requirement if the question becomes not what the prisoner actually presented on appeal but rather what a state appellate court might have decided to address but for its own procedural rules. Exhaustion would become a mere formality—a "perfunctory jaunt" through the state court system. *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994). The so-called "fair opportunity" test accords no respect to state court procedural rules and undermines the premise of exhaustion and fair presentment altogether.

Oregon's proposed explicit facial presentation test respects the state courts' responsibility to follow their procedural rules consistently while balancing the interests of the state prisoner and the federal courts. The Court has previously suggested that fair presentment requires an explicit assertion of a federal right in state court. *See Duncan*, 513 U.S. at 366 ("If a habeas petitioner wishes to claim that an

evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) ("It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim was made.") (internal citations omitted). But the majority of circuits employ tests that focus on whether a state court reasonably could have viewed a prisoner's claim as having a federal law basis. *See* Petition for Writ of Certiorari at 18-21 (surveying the seven circuits who still employ "whole record review" and "substance of the claim" tests post-*Duncan*).[1] Such a focus misses the point. Oregon's proposed test is entirely consistent with the comity concerns of exhaustion because both properly place the burden of clearly articulating a claim on the state prisoner and not on the courts. The states' legitimate and significant interests in controlling their courts, ensuring constitutionally fair proceedings, and receiving respect for their judgments are accomplished best through Oregon's approach.

II. Explicit facial denomination of federal claims respects the independent and important development of state constitutional law and prevents the waste of valuable and limited judicial resources of the states.

Eclipsed by the federal constitution for decades, state constitutional law now occupies a vital place in our federal scheme. This essential role of state constitutional law is threatened unless explicit denomination of federal claims is required by the fair presentment element of exhaustion under 28 U.S.C. § 2254(b)(1)(A).

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[1] As explained in Oregon's petition, the Ninth Circuit's "fair opportunity" test used in this case is a variety of the "whole record review" test. The "substance of the claim" test uses the four considerations explained in *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc).

The emergence of state constitutional rights doctrine accelerated in the 1970's. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). The number of state constitutional rights doctrines that are distinct from their federal counterparts continues to increase. David Schuman, *A Failed Critique of State Constitutionalism*, 91 Mich. L. Rev. 274, 276 (1992). When a state court interprets a provision of its state constitution, that court is free to expand the interests created by the parallel federal provision and to adopt a separate methodology for analyzing those claims. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). State constitutional provisions that are textually distinct from their federal analog may signal a different intent on the part of the state framers, thereby necessitating an independent interpretation. James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 Wash. L. Rev. 1099, 1103 (1991). Even with virtually identical language, a state may adopt an interpretation and mode of analysis different from its federal counterpart. *See, e.g., State v. Kaluna*, 520 P.2d 51, 58-59 (Haw. 1974) (holding that the circumstances surrounding an arrest must justify searches incident to arrest); *Collins v. Day*, 644 N.E.2d 72, 74-75 (Ind. 1994) (adopting a methodology for state privileges and immunities claims that is distinct from the federal equal protection standard).

Encouraging this growth is important, because states constitute an important laboratory for constitutional law. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *State v. Caraher*, 293 Or. 741, 749, 653 P.2d 942, 951 n.13 (1982) (observing that the Bill of Rights was based upon corresponding provisions of the first state constitutions). The Court has supported the development of state constitutional law in part by respecting a state court's disposition of issues on state constitutional law grounds. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11-12 (1987); *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983).

States have also revitalized their constitutions by adopting a principle of resolving cases on state constitutional grounds exclusively and relying upon the federal constitution only when the former proves insufficient to dispose of the claim. *See, e.g., Large v. Superior Court,* 714 P.2d 399, 405 (Ariz. 1986). State courts often resolve claims exclusively on state constitutional law grounds when both federal and state constitutional issues are present. Ronald K. L. Collins, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 Hastings Const. L.Q. 599 (1986) (surveying state supreme court decisions from 1950 to 1980 and finding 311 such instances from forty-five states); *see also* Robert F. Williams, *In the Glare of the Supreme Court*, 72 Notre Dame L. Rev. 1015, 1017 (1997). States have even refused to decide an issue and demanded supplemental briefing on state constitutional law when the parties limited themselves to federal constitutional grounds. *State v. Jewett*, 146 Vt. 221, 222-30, 500 A.2d 233, 234-39 (1985). State constitutionalism allows the states to give independent meaning to their state constitutional protections and to interpret those provisions in unique ways that address the historical concerns of those states.

Many state constitutional provisions are read more expansively than their federal counterparts and are analyzed using distinct methodologies. *See, e.g., Committee to Defend Reprod. Rights v. Myers,* 29 Cal.3d 252, 257-62, 625 P.2d 779, 781-84 (1981) (privacy, due process, and equal protection); *People v. Sporleder,* 666 P.2d 135, 139-42 (Col. 1983) (searches); *State v. Kaluna*, 520 P.2d 51, 58-59 (Haw. 1974) (searches); *Epeldi v. Engelking,* 94 Idaho 390, 393-96, 488 P.2d 860, 863-66 (1971) (separation of church and state); *Richardson v. State,* 717 N.E.2d 32, 48-49 (Ind. 1999) (double jeopardy); *Baldwin v. Reagan,* 715 N.E.2d 332, 337 (Ind. 1999) (searches); *Collins v. Day*, 644 N.E.2d 72, 74-75 (Ind. 1994) (equal protection); *Brady v. State,* 575 N.E.2d 981, 984-89 (Ind. 1991) (confrontation); *Attorney General v. Colleton,* 387 Mass. 790, 795-801, 444 N.E.2d 915, 918-21 (1982) (self-incrimination); *Peterson v. Peterson,* 278 Minn.

275, 277-78, 153 N.W.2d 825, 827-28 (1967) (right to jury); *State v. McGann,* 124 N.H. 101, 104, 467 A.2d 571, 573 (1983) (searches); *State v. Schmid,* 84 N.J. 535, 552-60, 423 A.2d 615, 624-28 (1980) (access to public forums); *Cooper v. Morin,* 49 N.Y.2d. 69, 76-79, 399 N.E.2d 1188, 1192-94 (1979) (due process); *State v. Kennedy,* 295 Or. 260, 270-72, 666 P.2d 1316, 1323-24 (1983) (double jeopardy); *Commonwealth v. Ludwig,* 527 Pa. 472, 474-79, 594 A.2d 281, 282-84 (1991) (confrontation); *Washakie County Sch. Dist. Number One v. Herschler,* 606 P.2d 310, 319, 332-33 (Wyo. 1980) (equal protection in school funding). The presence of distinct state rights combined with the preference for deciding cases on state law grounds, emphasizes the need for express facial presentment. If only a general claim is made, many state courts will look to state constitutional law exclusively. A general claim made in such a state has not raised a federal claim.

A grant of habeas relief on a federal claim that was never explicitly raised before a state's appellate courts and formed no part of the state appellate determinations threatens the state courts' legitimate interest in defining the scope of their review when confronted with claims framed in general language. The grant of habeas relief in such circumstances also threatens the states' compelling interest in interpreting their own constitutions and in not having those decisions essentially rendered impotent by a subsequent federal court. Express, facial denomination of federal claims is necessary if the distinct role of state constitutions is to be preserved.

III. Without a requirement of express facial presentment, state government attorneys will be forced to comb the record and case law for potential federal claims that may exist in order to help protect the vitality of a state court's ultimate disposition.

Oregon correctly notes how its proposed test strikes a proper balance between the interests of state prisoners, state courts, and the federal courts, but the interests of state government attorneys will also served by an express facial

presentment requirement. Such a requirement relieves state appellate attorneys from expending significant resources combing the record for any possible federal issues that, although not actually raised in state court, must be addressed in an attempt to ensure that federal courts will accord the state court judgments the proper respect. Oregon's proposed requirement would also reduce the substantial litigation that occurs in federal habeas courts over the threshold issues of exhaustion and procedural default. In contrast, the Ninth Circuit's "fair opportunity" test places a tremendous and unnecessary burden on the state government attorneys who are entrusted with defending criminal convictions.

Oregon's proposed test does not place additional burdens on an already overburdened corps of state court government attorneys. State government attorneys' interests in assuring that federal courts properly respect state court decisions is at least as great as that of the state courts. Those attorneys must protect convictions through the several layers of appellate and collateral review, including federal habeas corpus review. "Whole record review" and "substance of the claim" tests require state government appellate attorneys to search the record for any possible federal claims that relate to claims actually asserted in the state court briefs. In such circuits, state government attorneys must look beyond the discrete claim presented to the state court and must scour the record for any related federal claims. These tests force state government attorneys to address in state court all potential federal bases for claims. State court judges are then presented with arguments that are superfluous to the actual claim urged by the defendant. State judicial systems are significantly burdened by the consequences of an exhaustion rule that purports to respect comity and state interests but fails to do so. Oregon's proposed test alleviates these consequences and affords genuine respect to the resolution of the case as presented by the parties.

Attorneys who defend state court convictions in federal habeas proceedings expend valuable state and federal

resources litigating exhaustion and fair presentment issues. As Justice Stevens has observed, "Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner has adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus." *Anderson*, 459 U.S. at 8 (Stevens, J., dissenting). So too with state government attorneys. The tests employed by the majority of circuits encourage more litigation than if no exhaustion requirement existed. State prisoners assert every claim that they see fit, regardless of whether they are federal claims or were fairly presented to state courts. These tests require additional litigation to determine whether the federal courts will hear them in the first place.

An express facial presentment test as proposed by Oregon will eliminate much of the inquiry. State prisoners, state government attorneys, and federal courts alike will be able to identify unexhausted claims with ease. Little is served by federal courts going out of their way to identify potential federal claims when the state prisoners did not seek their vindication earlier, and much is gained by simplifying federal habeas procedures. The Court should adopt Oregon's proposed test for fair presentment.

CONCLUSION

The *Amici* states respectfully request the Court adopt Oregon's proposed facial presentation test and reverse the judgment of the Ninth Circuit.

STEPHEN R. CARTER
Attorney General of Indiana
**GARY DAMON SECREST*
Chief Counsel and
Deputy Attorney General
Indiana Gov't Center South
5th Floor
302 West Washington Street
Indianapolis IN 46204
Telephone: (317) 232-6315

* *Counsel of Record for Amici Curiae*

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IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

vs.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

41 pp

QUESTION PRESENTED

Has a state prisoner "fairly presented" his federal claim to the state courts, as that term is used in this Court's exhaustion and procedural default cases, when he presents the claim to the trial court in state post-conviction review, but his state appellate briefing neither cites the federal Constitution, nor cites case law based on the federal Constitution?

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IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

vs.

MICHAEL REESE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Ninth Circuit has directed that a Sixth Amendment claim be litigated on the merits in federal habeas corpus despite the fact that the habeas petitioner did not fairly present the claim at either level of the state's appellate

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

process, after counsel appointed for the petitioner at state expense determined that the claim had no merit. Such unnecessary relitigation of abandoned claims is contrary to the interests that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts and procedure of the present case, taken from the Ninth Circuit's opinion, may be summarized as follows:

Michael Reese was convicted in an Oregon state court of two counts of kidnapping and one count of attempted sodomy. *Reese* v. *Baldwin*, 282 F. 3d 1184, 1186 (CA9 2002). His convictions were affirmed on appeal, but his appellate counsel twice obtained reversals and remand for resentencing. *Id.*, at 1186-1187. However, on the third round, new appellate counsel found no meritorious issues to brief and followed an Oregon procedure, called a *Balfour* brief, which allows the defendant to brief *pro se* issues he wishes to raise. See *id.*, at 1187, and n. 1.

On state post-conviction review (PCR), Reese made a claim of ineffective assistance of appellate counsel, among other issues not relevant here. *Id.*, at 1188. His *pro se* petition did not cite federal authority for this claim, but the court appointed counsel who filed an amended petition which did cite the Sixth and Fourteenth Amendments. *Ibid.* On appeal from the trial court's denial of relief, a different attorney was appointed for Reese. He could find no meritorious issues and filed another *Balfour* brief. Reese's *pro se* PCR petition was attached as his part of the *Balfour* brief. *Ibid.* The Ninth Circuit says counsel "inexplicably" did this. *Ibid.* Since this portion of the *Balfour* brief is normally done by the appellant himself, if this choice was made without his knowledge or over his objection, it is surely up to him to say so. The most logical inference, in the absence of any evidence to the contrary, is that Reese himself chose to attach his *pro se* petition rather than the counsel-

prepared petition. For whatever reason, no federal authority in support of this claim was cited to the Oregon Court of Appeals.

On petition for discretionary review to the Oregon Supreme Court, a petition was prepared by counsel. It made passing reference to a claim of ineffective assistance of appellate counsel, but cited no facts, made no argument, and cited no authorities, state or federal, in support of the claim. *Id.*, at 1188-1189, and n. 5.

On federal habeas, the District Court found the ineffective assistance of appellate counsel claim to be procedurally defaulted. *Id.*, at 1189. The Court of Appeals for the Ninth Circuit reversed, believing the determinative question to be "whether Reese *alerted* the Oregon Supreme Court to the federal nature of his claim of ineffective assistance of appellate counsel." *Id.*, at 1192 (emphasis added).

SUMMARY OF ARGUMENT

The state appellate court is the primary forum for reviewing state trials, including any federal questions arising in those trials. The role of federal habeas corpus is "secondary and limited." The exhaustion and procedural default rules are essential components of Congress's policy to limit federal habeas corpus to its proper role. Not only does the procedural default rule protect the integrity of the exhaustion rule, as this Court has previously recognized, but these two rules also protect the integrity of the new "deference" rule of the Antiterrorism and Effective Death Penalty Act of 1996.

Since *Wainwright* v. *Sykes* in 1977, the procedural default rule has been considered a part of the doctrine of adequate and independent state grounds. However, the rule was originally understood to be part of the exhaustion requirement. The numerous problems with the adequate and independent state grounds doctrine make it appropriate, at this point, to reconsider that original understanding. The doctrine of adequate and

independent state grounds was developed for direct review and has not imported well into habeas corpus. Interpretation of the summary and unexplained state-court dispositions which are common in routine criminal cases has proven to be a continuing problem. The Ninth Circuit has applied the "strictly and regularly followed" requirement in such a severe manner as to create a perverse incentive for states to create rigid rules for cutting off state collateral review. A default rule based on the exhaustion requirement, if properly implemented, would simplify the task of federal habeas corpus and eliminate this perverse incentive.

ARGUMENT

I. The exhaustion and procedural default rules are essential components of Congress's policy to limit habeas to a secondary role.

A. History.

"Habeas corpus 'is designed to guard against *extreme malfunctions* in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment)). This role is "secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Keeping federal habeas confined to that role has been a continuing challenge for both Congress and this Court for well over a century.

In the original Judiciary Act, Congress gave the federal courts no jurisdiction to issue habeas corpus for state prisoners, except to bring them to court to testify. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 82. Only limited exceptions were made before the Civil War. See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 33 (1965). In 1867, Congress broadened federal habeas jurisdiction for the purpose of enforcing the

Thirteenth Amendment and related emancipation legislation. The expansion had nothing to do with using habeas corpus to review the final judgment of a competent court in a criminal case. See *id.*, at 36-37; Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1108-1117 (1995). Such use was precluded under the case law up to that time, especially *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 209 (1830). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-933 (1998). Nevertheless, the jurisdiction was used for that purpose during Reconstruction and the years immediately following. In 1884, the House Judiciary Committee reported,

> "But if the act of 1867 intended to allow interference in cases of arrests by State officers, under State authority, the committee do not believe that it was contemplated by its framers or can properly be construed to authorize the overthrow of the final judgments of the State courts of general jurisdiction, by the inferior Federal judges, whose judgments shall be final, *and thus make them a court of errors over the highest tribunals of the States*." H. R. Rep. No. 730, 48th Cong., 1st Sess., 5 (1884) (emphasis added); see also *Fay* v. *Noia*, 372 U. S. 391, 452-453 (1963) (Harlan, J., dissenting).

Congress's solution was to restore the appellate jurisdiction of this Court in habeas cases, which had been repealed during Reconstruction, with the confidence that this Court would rein in the lower federal courts. See Forsythe, 70 Notre Dame L. Rev., at 1121-1123; Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (1885). The Court responded by announcing the exhaustion rule in *Ex parte Royall*, 117 U. S. 241, 252-253 (1886). Although stated in terms of discretion, the rule effectively required state prisoners to pursue their remedies through the state appellate courts. The remedies to be exhausted at that time included a writ of error to this Court, see *Urquhart* v. *Brown*, 205 U. S. 179, 183 (1907), virtually shutting down

federal habeas for persons convicted in state courts. See Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1327 (1961). After the change in this Court's jurisdiction from mandatory to discretionary review for most cases, the remedies to be exhausted no longer included a right to a definitive resolution of the merits by this Court. See *id.*, at 1328; *Darr* v. *Burford*, 339 U. S. 200, 235 (1950) (Frankfurter, J., dissenting).[2] Even so, as late as 1950, it was the rule that the federal habeas court "may decline to examine further into the merits because they have already been decided against the petitioner" and "that the state's highest courts should ordinarily be subject to reversal only by this Court . . . ." See *Darr*, *supra*, at 215, 217.

Prior to the period of *de novo* review, exhaustion was much more than a rule of timing. Its purpose was to require the defendant to go to the state courts for a ruling on the merits which would, in most cases, be the last full examination of the case. "[A] federal court will *not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) (emphasis added). Relitigation in federal court was limited to cases where "the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . ." *Ibid.*; see also *Fay* v. *Noia*, 372 U. S., at 459-460 (Harlan, J. , dissenting). This is the rule Congress understood it was endorsing when it codified the exhaustion rule in 1948. See *Darr*, 339 U. S., at 211; *Rose* v. *Lundy*, 455 U. S. 509, 516 (1982).

Brown v. *Allen*, 344 U. S. 443 (1953) is the case generally credited with (or blamed for) abandoning the rule of deference and establishing *de novo* review as the norm. See, *e.g.*, *Noia*, 372 U. S., at 460 (Harlan, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 154-155 (1970); but see *Wright* v. *West*, 505 U. S. 277, 287-288 (1992) (opinion of Thomas, J.) (disputing that *Brown* actually held that); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, pp. 14-16 (same). Judge Friendly attributes the abandonment of this rule and the establishment of *de novo* review on federal habeas to "the growth of the country and the attendant increase in the Court's business," so that the Court "had to summon the inferior federal judges to its aid" to correct errors in state courts. Friendly, *supra*, at 155. While growth of the country may be part of the explanation, there can be no doubt that state court resistance to civil rights and to the greatly expanded rights for criminal defendants in the 1950s and 1960s was also a major factor. By the mid-1970s, this hostility to federal rights had abated, see *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976), and a period of retrenchment began, culminating in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

2. *Darr* has been overruled on other grounds. See *infra*, n. 10.

AEDPA made many changes to habeas corpus law, but the most important was the abrogation of the rule of *de novo* review. See *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000). Simultaneously, Congress strengthened the exhaustion rule, specifying that the state could expressly waive the rule, but not inadvertently default it. See 28 U. S. C. § 2254(a)(3). Congress must have considered exhaustion to be a vitally important policy to make it one of the few defenses in the law which cannot be lost by failure to assert it. The reason lies in how three rules—exhaustion, default, and deference—fit together to restrain federal habeas from substituting for state appeal.

B. Three Interlocking Pieces.

In *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999), both the majority opinion and Justice Stevens' dissent addressed the "interplay" of the exhaustion and procedural default rules. See *id.*, at 848. The majority agreed with the dissent that

> "a prisoner could evade the exhaustion requirement—and thereby undercut the values that serves—by 'letting the time run' on state remedies. *Post*, at 853. To avoid this result,

and thus 'protect the integrity' of the federal exhaustion rule, *ibid.*, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts, see *post*, at 854." *Ibid.* (emphasis in original).

The *O'Sullivan* dissent's assertion that the two rules are "analytically distinct," *id.*, at 850, is an overstatement. The fact that one of the principal purposes of the procedural default rule is to protect the integrity of the exhaustion rule necessarily ties the two together. The procedural default rule cannot serve this function unless the requirement of fair presentation is identical for both rules. If we assume the validity of present doctrine that the exhaustion requirement is satisfied by letting the time run, so that no state remedy remains available,[3] then it is essential that any claim "exhausted" in this improper manner be subject to the procedural default rule. Otherwise, there would be a loophole allowing defendants in state criminal proceedings to bypass state courts and raise their claims for the first time in federal court, without qualifying for any of the exceptions to the procedural default rule.

Stated another way, *every* claim asserted on federal habeas falls into one and only one of three categories: (1) it was fairly presented to the state courts; (2) it is unexhausted; or (3) it is procedurally defaulted. If the claim was fairly presented, the federal court can proceed to the questions of AEDPA and *Teague* v. *Lane*, 489 U. S. 288 (1989). See *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*). If any claim is unexhausted, the petition must be dismissed. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). If the claim is procedurally defaulted, it must be denied unless the petitioner can show cause and prejudice or a fundamental miscarriage of justice. See *Coleman* v. *Thompson*, 501 U. S. 722, 746, 757 (1991).

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3. We challenge this assumption in Part II, *infra*.

With the enactment of AEDPA, the exhaustion and procedural default rules not only reinforce each other, but they now serve the additional purpose of protecting the integrity of the "deference" standard of 28 U. S. C. § 2254(d). After AEDPA, it is once again the exception rather than the norm for a question decided in state court to be decided again in federal court, as it was before *Brown* v. *Allen*. See Scheidegger, 98 Colum. L. Rev., at 946; *supra*, at 6. If the state court decided the merits, then the federal court need only satisfy itself that the state court's decision is neither contrary to nor an unreasonable application of Supreme Court precedent. At that point the habeas case is over, and the federal court need not decide the underlying question. See, *e.g.*, *Lockyer* v. *Andrade*, 538 U. S. __, 155 L. Ed. 2d 144, 155, 123 S. Ct. 1166, 1172 (2003); *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 288, 123 S. Ct. 357, 361 (2002) (*per curiam*).[4] Only by such shortening of the decision process would this section achieve Congress's goal in enacting it, to reduce delay. See *Williams* v. *Taylor*, 529 U. S., at 404.

State criminal defendants sometimes perceive, often accurately, that the federal courts of their circuit are more likely to look favorably on a marginal claim than the courts of their state. For example, *Woodford* v. *Visciotti*, *supra*, is quite typical of California capital cases, where the California Supreme Court decides an ineffective assistance claim well within the boundaries of this Court's precedents only to have it erroneously vacated on federal habeas corpus, in violation of the standard of AEDPA. This Court summarily reversed in *Visciotti*, and hopefully the clarification of the standard will result in habeas being properly denied in similar cases in the future.

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4. The habeas court *may* decide the merits first, as a correct decision is necessarily a reasonable decision, see *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000), but this will typically not be the most efficient method.

Defendants seeking to avoid this result may see it in their interest to *avoid* obtaining a state court resolution of the merits of their federal claim. The fair presentation requirement, properly applied, will prevent such evasion of the intent of Congress. *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989) held that the fair presentation requirement was not fulfilled when the petitioner presented his claim to the state court in a manner that would not normally result in a decision on the merits.

The Ninth Circuit held in the present case that the exhaustion requirement is satisfied if the Oregon Court of Appeals merely had *notice* that a federal claim existed in the case, regardless of whether the petitioner actually presented that claim to that court. *Reese* v. *Baldwin*, 282 F. 3d 1184, 1193 (CA9 2002). This Court unequivocally rejected the notice theory of exhaustion in *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 10 (1992): "Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful." With the enactment of AEDPA, meaningful exhaustion is more important now than it was when *Keeney* was decided.

C. Serious and Meaningful Appeals.

When Congress enacted § 2254(d), regarding claims "adjudicated on the merits in State court proceedings," it no doubt had principally in mind claims denied in written opinions by appellate courts. *Amicus* CJLF does not denigrate the written rulings of trial courts, but it is common knowledge that appellate courts more often have the resources needed to produce a quality opinion on a substantial question. The more thorough the state opinion, the more straightforward will be the task of the federal habeas courts. Summary denials and denials with minimal explanation can present problems in the application of § 2254(d). See *Washington* v. *Schriver*, 255 F. 3d 45, 52-53 (CA2 2001) (noting difficulty and division among circuits); cf. *Coleman*, 501 U. S., at 740 (summary denial and procedural default).

While summary affirmances are, to some extent, a necessary evil for overburdened appellate courts, a reasoned opinion is a far more likely result if the appellant has presented a substantial claim of a violation of a constitutional right. Conversely, summary rejection is far more likely when an appellant presents a claim devoid of content. The general rule throughout the United States is that an appellate court is justified in treating a claim as waived if it is presented without facts, argument, or authorities.

The California rule is typical:

> "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the courts may treat it as waived, and pass it without consideration." 9 B. Witkin, California Procedure § 594, p. 627 (4th ed. 1997); *People* v. *Stanley*, 10 Cal. 4th 764, 793, 897 P. 2d 481, 497 (1995) (quoting previous edition of Witkin for this point).

Oregon follows a similar rule. "Defendant offers no argument on this assignment [of error] and cites no cases. The assignment not having been discussed in the brief, it 'is presumed waived,' [citation], or it is 'abandoned.' [Citation.]" *Meskimen* v. *Larry Angell Salvage Co.*, 592 P. 2d 1014, 1019 (Or. 1979); *Peterson* v. *Maass*, 882 P. 2d 1140, 1141, n.2 (Or. App. 1994) (applying *Meskimen* to constitutional claims in PCR case).[5] So do other courts around the country, applying it alike to civil and criminal cases and constitutional as well as nonconstitutional issues. See, *e.g.*, *Commonwealth* v. *Johnson*, 602 N. E. 2d 555, 558, n. 6 (Mass. 1992) (search and seizure

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5. We understand that Oregon law on this point will be described in more detail in the Oregon Attorney General's brief, so we will not repeat it here.

claim without argument waived); *New England Tel. & Tel. Co.* v. *City of Franklin*, 685 A. 2d 913, 918 (N. H. 1996) ("passing reference" insufficient, argument waived). A party who claims a violation of both the state and federal constitutions must cite authority for both, or the unsupported claim is waived. See *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S. W. 2d 371, 375, n. 4 (Tex. 1998) (claim under both First Amendment and parallel Texas provision, state claim waived by lack of authority).

Federal practice is also in accord. "Issues presented in the brief will be dismissed or deemed waived if the appellant's contentions are omitted, if no relevant authority is cited, or if the brief merely incorporates by reference arguments presented to the District Court." 20A J. Moore, Moore's Federal Practice § 328.20[9], p. 328-14 (3d ed. 2003) (footnotes omitted). "[A]n argument or claim mentioned only in passing or only in a footnote is not adequately raised or preserved for appellate review." *Id.*, at 328-15 to 328-16. Indeed, if a habeas petitioner files a brief in the Ninth Circuit like the one Reese filed in the Oregon Supreme Court, the Ninth Circuit itself will consider the point waived. See *Acosta-Huerta* v. *Estelle*, 7 F. 3d 139, 144 (CA9 1992); see also *Reese* v. *Baldwin*, 282 F. 3d, at 1195 (Nelson, J., dissenting).

Looking at Reese's petition for review and the Oregon cases on waiver by failure to brief, it is evident that the Oregon Supreme Court *could* have denied relief on this basis and that this would be an adequate and independent state ground sufficient to deny federal habeas relief. However, that basis for decision would raise all of the familiar problems of determining the actual basis for a summary order. See generally *Coleman*, *supra*. That problem is particularly acute when the procedural default consists of a dismal failure to make *any* case on the merits, since the state judges themselves may not clearly distinguish whether they are denying relief for lack of merit or failure to argue any merit. A better basis for decision is that a contention on appeal so lacking in argument or authority that a

court would be justified in deeming it waived under the standards prevailing generally in American appellate courts is insufficient, as a matter of federal habeas law, to constitute a fair presentation of the claim. Because the claim was not fairly presented, it is unexhausted if the petitioner can still return to the state courts to fairly present the claim, and otherwise it is procedurally defaulted.

II. The procedural default rule should be returned to its original status as a component of the exhaustion requirement.

A. The Rise, Fall, and Rise of the Procedural Default Rule.

In modern cases, it has become common to assert matter-of-factly that the exhaustion requirement is satisfied, even though the claim has not been fairly presented to the state courts, if the time to assert the claim there has expired. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 850 (1999) (Stevens, J., dissenting). That was not the rule prior to 1963, and the issue is ripe for reconsideration.

Ex parte Spencer, 228 U. S. 652 (1913) appears to be the first Supreme Court case that expressly addresses a claim for which state remedies were no longer available at the time of the filing of the federal habeas petition.[6] Spencer appealed his conviction to the intermediate appellate court and sought review in the Pennsylvania Supreme Court without raising his *ex post facto* claim. *Id.*, at 658. He then raised his *ex post facto* claim in state habeas, which was denied, and then federal habeas. *Ibid.* The Court denied relief, citing the exhaustion

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6. *In re Wood*, 140 U. S. 278, 289-290 (1891) is a possibility, invoking the exhaustion rule for a claim never presented to the state courts when the time to do so appears to have passed, without inquiring whether any state remedy remained available. However, the opinion is not explicit on the point.

rule. See *id.*, at 659-660 (citing *Urquhart* v. *Brown*, 205 U. S. 179 (1907)).

> "It is true the rule has been announced in cases where *habeas corpus* was applied for in advance of final decision in the state courts; but the principle of the rule applies as well after decision. The rule would be useless except to enforce a temporary delay if it did not compel a review of the question in the state court and, in the event of an adverse decision, the prosecution of error from this court. In other words, if it gave freedom to omit such defenses in the state court and subsequent review by this court, and yet the accused have an absolute right to *habeas corpus*." *Id.*, at 660.

Claims that the judge-made *Royall* rule, see *supra*, at 5, was strictly a timing rule and referred only to remedies existing at the time of the federal habeas petition, see, *e.g.*, *O'Sullivan*, 526 U. S., at 850, 852-853 (Stevens, J., dissenting), cannot be reconciled with *Spencer*. As far back as 1913, a failure to exhaust state remedies permanently barred federal habeas corpus if the unexhausted remedy had lapsed in the interim.

The two best-known early twentieth century cases are more equivocal. *Frank* v. *Mangum*, 237 U. S. 309, 338-340 (1915) denied habeas relief on a claim defaulted at trial (presence of the defendant when the verdict was rendered) and rejected for that reason on appeal.[7] The basis is that the state's default rule was a reasonable one, comporting with due process, consistent with the later theory of an adequate state ground. In a similar procedural posture, *Moore* v. *Dempsey*, 261 U. S. 86 (1923) vacated a dismissal and remanded for a hearing on the merits. The basis of this action is less than clear, but it appears to be that the magnitude of the violation alleged, "that the whole proceeding is a mask—that counsel, jury, and judge were swept

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7. Frank's much stronger claim of a mob-dominated trial was rejected on the basis of deference to contrary state court factual findings, *id.*, at 338, which remains the law to this day. See 28 U. S. C. § 2254(e).

to the fatal end by an irresistible wave of public passion," *id.*, at 91, called for overriding procedural requirements, reminiscent of the modern "miscarriage of justice" exception. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986). Looking at the facts of *Moore* through a modern lens, it is evident that Moore had a good claim of "cause" for default due to ineffective assistance of counsel. Cf. *id.*, at 492.

Wade v. *Mayo*, 334 U. S. 672 (1948) was decided two days before the codification of the exhaustion rule. See *Darr* v. *Burford*, 339 U. S. 200, 213, n. 34 (1950). Wade made his denial of counsel claim on state habeas and appealed the denial to the Florida Supreme Court, which dismissed without opinion. Wade did not petition this Court for certiorari. 334 U. S., at 675-676. A year later, he petitioned for federal habeas. Habeas cases are civil for the purpose of appellate time limits, see *United States* v. *Hayman*, 342 U. S. 205, 209, n. 4 (1952), so the time to petition for certiorari from the state decision was long gone. The Florida Supreme Court subsequently verified that its dismissal had been on the merits, not on failure to appeal. *Wade*, *supra*, at 678.

The *Wade* Court asked for argument on whether the exhaustion rule required dismissal, *id.*, at 677, and divided narrowly on the answer. The four dissenting Justices asserted (1) that certiorari is among the remedies to be exhausted, *id.*, at 689 (Reed, J., dissenting), and (2) that the exhaustion requirement applies equally to presently available remedies and those that are time-barred. *Id.*, at 695. Conspicuous by its absence from the majority opinion is *any* disagreement with the second proposition. The reversal is premised entirely on distinguishing writs of certiorari from this Court from the remedies in state courts, see *id.*, at 680-681, a distinction that would have been unnecessary if the exhaustion rule did not apply to defaulted claims.

Wade was overruled in *Darr*, *supra*, the first Supreme Court default case after codification of the exhaustion rule in 1948. Darr had not appealed from his conviction, but the state courts

had considered his claim on the merits in state habeas. See 339 U. S., at 202. He did not petition for certiorari from this decision, and the time to do so had long since expired by the time the case reached the Supreme Court. Most of the majority and dissenting opinions are devoted to a discussion of whether a certiorari petition to this Court is one of the remedies to be exhausted under § 2254. Neither opinion questions that denial for lack of exhaustion is the proper consequence of an affirmative answer to that question. See *id.*, at 201; *id.*, at 220 (Frankfurter, J., dissenting).

Failure to exhaust was the basis of the default holding in *Daniels* v. *Allen*, a companion case to *Brown* v. *Allen*, 344 U. S. 443 (1953). "A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, *bars* federal habeas corpus. The statute requires that the applicant exhaust available state remedies. *To show that the time has passed for appeal is not enough* to empower the Federal District Court to issue the writ." *Id.*, at 487 (emphasis added). Footnote 32 cites *Dowd* v. *Cook*, 340 U. S. 206 (1951), a case of interference with filing by prison officials, and two denial of counsel cases, *De Meerleer* v. *Michigan*, 329 U. S. 663 (1947) and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).[8] Justice Black dissented on the ground that this was a case of "flagrant defiance of the Constitution," in which, under *Moore* v. *Dempsey*, "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens . . . ." *Brown*, 344 U. S., at 554; cf. *Rose* v. *Lundy*, 455 U. S., at 543 (Stevens, J., dissenting) (proposing unlimited habeas review for "fundamental" claims, regardless of default, and no relitigation of nonfundamental claims). Justice Frankfurter dissented based on both the magnitude of the violation and the arbitrariness of the state rule as applied to this case. 344 U. S., at 557-558; cf. *Lee* v. *Kemna*, 534 U. S.

8. The reference to footnote 33 is unclear, as this note deals with another point.

362, 378 (2002) ("in this atypical instance, [applying] the Rule would serve 'no perceivable state interest' ") (quoting *Osborne* v. *Ohio*, 495 U. S. 103, 123 (1990)). Neither dissent questions that a routine claim would be defaulted by failure to properly exhaust state remedies.

The next case in the series is *Irvin* v. *Dowd*, 359 U. S. 394 (1959). Irvin had a strong claim of denial of due process due to inflammatory publicity, see *id.*, at 396-399, which he defaulted by escaping. *Id.*, at 400. The main issue was the interpretation of the state supreme court opinion, which the majority read as excusing the procedural default and resting on the federal merits. See *id.*, at 403. The opinion unequivocally reaffirmed that exhaustion was the basis of the procedural default rule, and distinguished *Daniels* on its facts without disagreeing with its rule of law. *Id.*, at 404-406. Justice Harlan saw the question as "whether the state court's judgment affirming the conviction rests independently on . . . a state ground." *Id.*, at 413 (dissenting opinion). This was the first time that doctrine had been expressly invoked in a habeas procedural default case in this Court.[9] The *Irvin* opinion was greeted by two scathing law review articles. See Hart, Foreword, The Time Chart of the Justices: The Supreme Court 1958 Term, 73 Harv. L. Rev. 84 (1959); Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961). Nonetheless, *Irvin* marked the fourth case in a row in which the exhaustion rule was considered the basis of procedural default.

Justice Brennan, the author of *Irvin*, was also the author of *Fay* v. *Noia*, 372 U. S. 391 (1963). "This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has

9. More precisely, it was the first time in a federal habeas case. The doctrine had previously been invoked to deny review by this Court of state habeas decisions, when the state court declined to review claims that could have been made on appeal, but were not. See *Woolsey* v. *Best*, 299 U. S. 1, 2 (1936) (*per curiam*).

rendered in a long time." *Id.*, at 448 (Harlan, J., dissenting). *Noia* reviewed the two arguable bases of the Court's past procedural default decisions, independent state grounds and exhaustion, and rejected them both, *id.*, at 428-435, all the while denying that anything it said was inconsistent with precedent.[10] In place of the long line of precedent overruled *sub silento* was a newly-minted standard of deliberate bypass. *Id.*, at 438.

Noia was utterly indefensible as a matter of history or precedent. See *id.*, 449-463 (Harlan, J., dissenting); Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 58 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 458-468 (1966). The defensible ground for the decision lay not in the history of the Great Writ but in the exigencies of the times. This was the era of "massive resistance," and state courts hostile to civil rights were shamelessly manipulating procedural rules to block federal review. See, *e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958). Professor Bator recognized this on the eve of the *Noia* decision. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 523-524 (1963). It is most unfortunate that the *Noia* opinion did not forthrightly assert the real reason, rather than take the path it did. See Oaks, *supra*, at 472.

When the emergency that prompts measures of dubious legality has passed, the law should return to normal. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866). So it happened, eventually, with habeas corpus. The *de novo* review rule of *Brown* v. *Allen*, *supra*, was mitigated by this Court in *Stone* v. *Powell*, 428 U. S. 465, 481-482 (1976) and *Teague* v. *Lane*,

10. On the other hand, *Noia* was frank in overruling the holding of *Darr*, that a petition for certiorari to this Court was required for exhaustion, on the sensible and legitimate ground that the growth in the Court's workload had rendered it impractical. *Id.*, at 437.

489 U. S. 288, 310 (1989) (plurality opinion), and it was finally abrogated by statute in AEPDA, enacting 28 U. S. C. § 2254(d)(1). All three rules were based in large part on renewed confidence in state courts. See *Stone*, *supra*, at 493, n. 35; *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994); 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch).

The procedural default rule had a similar stepwise revival. In *Davis* v. *United States*, 411 U. S. 233, 234-236 (1973), a federal defendant sought to use *Noia* to get around the requirement of Federal Rule of Criminal Procedure 12(b)(2), that an objection to the composition of the grand jury must be raised before trial, unless cause for raising it later was shown. The Court found it "inconceivable" that Congress could have intended 28 U. S. C. § 2255 to allow such an easy circumvention of a rule that Congress had "adopted." *Davis*, *supra*, at 241-242. The dissent protested that this was contrary to *Noia*, see *id.*, at 245 (Marshall, J., dissenting), and so it was. *Francis* v. *Henderson*, 425 U. S. 536, 539-541 (1976) relied heavily on *Davis* in a state prisoner case. The brief opinion did not state any explicit theoretical ground for making the jump from federal to state prisoners. Congress had not enacted the state procedural rule. However, *Francis* did rely on a direct review, independent state grounds case. *Id.*, at 541 (quoting *Michel* v. *Louisiana*, 350 U. S. 91 (1955)). It would have been difficult to invoke the pre-*Noia* exhaustion basis of procedural default in a case relying heavily on *Davis*, because Davis was a federal prisoner, for whom the exhaustion doctrine was inapplicable.

Wainwright v. *Sykes*, 433 U. S. 72 (1977) made it official. A weak *Miranda* claim, see *id.*, at 96-97 (Stevens, J., concurring), was denied on default grounds, with independent state grounds endorsed as the basis of the default rule. See *id.*, at 81. Exhaustion as the basis of the default rule is not mentioned. *Sykes* claims *Brown/Daniels* was based on "an independent and adequate state procedural ground." See *id.*, at 82 (citing *Brown*, 344 U. S., at 486-487). This is a curious citation. The paragraph of *Brown* that spans those two pages is unequivocally an

exhaustion rationale, and the discussion that precedes that paragraph relies on *Darr*, *Spencer*, and *Wood*, all of which are unambiguous exhaustion cases. See 344 U. S., at 486, n. 35. Heavy reliance on *Davis* and *Francis*, see *Sykes*, *supra*, at 84-85, was probably thought necessary in *Sykes* to meet the *stare decisis* implications of the dissent's reliance on *Noia*. See *id.*, at 99 (Brennan, J., dissenting); see also *id.*, at 81 (noting how much turmoil there has been in habeas law). Arguably, basing the decision on *Davis* and *Francis* meant having to rely on independent state grounds rather than exhaustion. For whatever reason, that has been considered the basis of the default rule ever since, without critical reexamination.[11]

The endorsement of independent state grounds as the basis of the procedural default rule seems to be something of a historical accident. It apparently arose from the need to ease out an expediency-based decision that had outlived its usefulness, rather than from a considered evaluation of its relative utility and appropriateness, compared to the earlier view that default was an aspect of the exhaustion rule. The importation into habeas corpus of a rule designed for this Court's direct review has created a host of problems. In the Ninth Circuit, particularly, these problems threaten the very existence of the procedural default rule and thereby threaten the integrity of the exhaustion rule.

B. The Statutory Language.

"*Plainly*," declares *Fay* v. *Noia*, "the words of § 2254 favor a construction limited to presently available remedies." 372 U. S., at 434, n. 42 (emphasis added). Why the Supreme Court of the United States on three separate occasions, see *supra*, at 15-17, applied this statute to a situation where it *plainly* does not apply is not explained. The *Noia* opinion also says, "Very little support can be found in the long course of previous

11. *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) finally overruled *Noia*.

decisions by this Court" that Congress understood it was codifying in 1948. *Id.*, at 434-435. As discussed *supra*, at 13-14, *Ex parte Spencer* is a precedent of this Court *squarely holding* that the exhaustion rule applies to this situation, and that precedent was not overruled or questioned in any decision prior to the codification. The history of the statute therefore provides very *strong* support that defaulted claims are included in the exhaustion rule, and the language is worth another look.

The 1948 codification survives today as subdivisions (b)(1) and (c) of 28 U. S. C. § 2254, with only stylistic changes:[12]

> "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

12. The original language is quoted in *Brown*, 344 U. S., at 462, n. 17.

Subdivisions (b)(2) and (3) are new in AEDPA. Their only relevance to the present question is the strong reaffirmation by Congress in (b)(3) of the importance of the exhaustion rule. See *supra*, at 7. The two pre-*Noia* law review articles simply state the supposedly clear inapplicability of the statutory language to time-barred remedies as an *ipse dixit*, and neither mentions *Spencer*. Reitz, 74 Harv. L. Rev., at 1365 (citing Hart); Hart, 73 Harv. L. Rev., at 113; see also *Noia*, 372 U. S., at 434, n. 42 (citing Reitz).

The starting place for analyzing a statutory exhaustion requirement is what such requirements mean in the law generally. Outside of habeas corpus, this term arises most often in administrative law. Congress sometimes requires that aggrieved persons "exhaust" their administrative remedies before turning to the courts. The common understanding of such statutes is that they refer to remedies existing at any time prior to filing the court suit, not just those remaining at the time of filing. *Porter* v. *Nussle*, 534 U. S. 516 (2002) is a recent example. Congress imposed an exhaustion requirement on prisoners in the Prison Litigation Reform Act of 1995, 42 U. S. C. § 1997e(a). See *Nussle*, *supra*, at 519-520. Nussle had 30 days to file his administrative grievance, and that time was long gone when he filed his civil rights court suit almost three years after the incident. *Id.*, at 521. The District Court correctly dismissed for failure to exhaust administrative remedies. See *id.*, at 521, 532. Conspicuous by its absence from this Court's opinion is any suggestion that Nussle had satisfied the exhaustion requirement simply by letting his time run. The general rule is well understood in administrative exhaustion that failure to invoke the administrative remedy within the time required forfeits both the administrative and the judicial remedies. For example, *Bowen* v. *City of New York*, 476 U. S. 467, 482 (1986), found that an administrative exhaustion requirement was excused under the circumstances, rather than satisfied, when claimants failed to employ an administrative review process within its time deadlines.

The question is whether there is anything in the language of § 2254 to indicate that Congress intended something different from the usual meaning of an exhaustion requirement. The present perfect tense "has exhausted" implies an action that has been completed as of the time of the federal habeas suit. The simple present tense in (b)(1)(A), "is an absence of available State corrective process," does not imply existence at any particular point in time. It is just as consistent with an interpretation referring to continuing existence in the state's remedial structure. The only language that leans in the direction of referring only to presently available remedies is subdivision (c). This subdivision does not purport to be an exclusive definition of exhaustion limiting the general rule of subdivision (b), but rather specifies one situation where "[a]n applicant shall *not* be deemed to have exhausted . . . ." (Emphasis added.)

History, in the form of the pre-1948 cases, illuminates the meaning of these phrases. As discussed *supra*, at 13-14, *Ex parte Spencer* supports exhaustion as referring to remedies available at any time in the process. *Amicus* has found no Supreme Court authority to the contrary. Professor Reitz admits, "cases interpreting the exhaustion requirement as applicable only to present state remedies are hard to find," and he could cite only two circuit cases, only one of which predated the codification. 74 Harv. L. Rev., at 1364, n. 165. The statute's reference to absence of state corrective process appears to be intended to deal with the situation of *White* v. *Ragen*, 324 U. S. 760, 764-767 (1945), where the state simply has no procedure for adjudicating constitutional claims based on facts outside the record. The statute also allows for the situation where state remedies are ineffective in practice in (b)(1)(B)(ii), a reference to cases of default caused by interference by the state or denial of counsel, see *Brown*, 344 U. S., at 486, n. 32, 487, or the situation in *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) where counsel intimidated by the mob defaulted the claim.

The language of the statute, on its face, is fully consistent with the view that the exhaustion requirement includes defaulted remedies as well as currently existing ones. When viewed in light of its history, this interpretation can be seen to be the correct one.

C. The Trouble with State Grounds.

Amicus CJLF would not ask this Court to overturn an interpretation in force for 26 years, however unsupported as initial matter, if that interpretation were working well. We would be content to let a sleeping dog lie if the dog were sleeping soundly. Regrettably, that is not the case. The complexities of the adequate and independent state grounds doctrine have caused the law of procedural default in habeas corpus to be radically different in different parts of the country, apparently beyond the capacity of this Court to correct. The doctrine creates perverse incentives for states to eliminate exceptions to their default rules, remove discretion from courts, and enact harsh statutes of limitations. If the wounds inflicted by this confused doctrine will not stop bleeding, then states must apply a tourniquet.

1. Improper focus.

The doctrine of adequate and independent state grounds was developed for questions of substantive law in state court cases subject to this Court's direct review. Where a state court's decision of a state law issue resolves the controversy regardless of which way the federal question is decided, there is no appropriate subject for this Court's review. See *Murdock* v. *City of Memphis*, 20 Wall. (87 U. S.) 590, 634-635 (1875). In this situation, the focus is necessarily and properly on the state court's decision, rather than on anything the parties have done.

Importing this test into habeas corpus and applying it to procedural rules creates considerable problems with interpreting state decisions. The state court decisions reviewed by this Court on certiorari typically involve questions of law on which

courts disagree, and they have usually been decided in full, reasoned opinions, most often by the highest court of the state, with the issue in question being the main issue of the case. Cases where a party merely asks for the application of established law to the facts of his case are rarely "certworthy." See Supreme Court Rule 10. Federal habeas corpus today is almost entirely about application of existing law to particular facts, since adventures in new lawmaking on habeas were largely shut down by *Teague* v. *Lane*, 489 U. S. 288 (1989) and AEDPA. The cases are often disposed of in the state courts with brief, unpublished opinions, particularly in noncapital cases. The claim at issue may have been one of a hundred, given the shotgun allegations of error so common in criminal appellate practice today. When these factors are combined, it is easy to see why difficulty in discerning the basis of the state decision is common. In the present case, we do not know and cannot know to what extent the Oregon Court of Appeals' affirmance was due to Reese's failure to properly raise and brief claims and to what extent it was due to the court's agreement with the lower court decision. The "look through" presumption of *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991) is unjustified when an issue is not briefed on appeal. Cf. *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991) (bright-line rules unjustified when counterfactual).

In one situation, the idea that a state judgment rests on an independent state ground with regard to a defaulted claim is pure fiction. That is the case when a petitioner goes to federal habeas corpus with a claim he has never presented to the state courts at all, but which is now barred under state law. In that case, the federal court must decide the state procedural question itself, and there simply is no relevant state decision to examine. See *Harris* v. *Reed*, 489 U. S. 255, 269-270 (1989) (O'Connor, J., concurring).

Basing the procedural default on exhaustion rather than independent state grounds would shift the focus from the state court decision to the steps taken by the petitioner to obtain a

state decision on the merits, and it would simultaneously simplify the inquiry. Assuming the state has a readily discernible forum and procedure for obtaining review of an issue, did the petitioner invoke the correct procedure in the correct forum within the allowed time? If he did not, then he has not exhausted available state remedies within the meaning of § 2254(b)(1)(A). The only qualification would be that if the state court clearly excused default and resolved a nonstandard or out-of-time petition on the merits, rather than on the default rule, federal habeas is not barred. See *Brown*, 344 U. S., at 486, and n. 33. Otherwise, the petitioner will have to try to qualify for one of the exceptions in subdivision (b)(1)(B), discussed *infra*, at 27-28.

2. Perverse incentives.

The doctrine that a state procedural rule, to be "adequate," must be "strictly and regularly followed" came from *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). *Barr* was one of a series of cases during the civil rights struggle, when some state courts cynically manipulated procedural rules in an attempt to preclude this Court's review. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, p. 11 ("*Lee* Brief").[13] Unfortunately, the "varying rubrics" used by this Court for "adequate" state grounds have never been unified into a coherent standard. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 582 (4th ed. 1996). Confusion in this area is rampant. See *Lee* Brief, at 5-11. Such confusion breeds radically different application of the law in different circuits.

In the Fifth Circuit, an "occasional act of grace" does not disqualify a state rule from being "adequate." *Amos* v. *Scott*, 61 F. 3d 333, 342 (CA5 1995). Similarly, the Seventh Circuit wisely recognizes that a strict interpretation of "strictly" would discourage flexibility and discretion in the operation of state

13. This brief is available on our Web site, http://www.cjlf.org/pdf/Lee.pdf

review systems, with "unacceptably harsh consequences." *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1383-1384 (CA7 1990). Regrettably, this wisdom has not prevailed in the Ninth Circuit, where a state default rule will be branded "inadequate" merely because it is "flexible" and "involves discretion." See *Fields* v. *Calderon*, 125 F. 3d 757, 762, 764-765 (CA9 1997), cert. denied, 523 U. S. 1132 (1998); *Petrocelli* v. *Angelone*, 248 F. 3d 877, 886, 888 (CA9 2001) (holding Nevada's procedural default rule "inadequate" because the state supreme court "exercises discretion" in capital cases). Apparently, the states of the Far West must adopt procedural default rules so mechanical that they can be programmed into a computer before they will be respected by the federal courts of the Ninth Circuit. That would be a considerable loss to the quality of justice.

If the focus were shifted to the question of whether the defendant timely invoked the proper remedy, this perverse incentive would disappear. The questions would be only whether the state had a clearly available procedure, whether the defendant invoked it, and, if not, whether the state court actually waived the default and decided his particular case on the merits instead. The existence of possible exceptions and the granting of discretionary waivers in other cases would be irrelevant.

D. Existing Exceptions.

The present doctrine of procedural default has exceptions for "cause and prejudice" and "fundamental miscarriage of justice." See *Coleman* v. *Thompson*, 501 U. S., at 748. The existence of these exceptions is somewhat difficult to reconcile with the theory that the petitioner is in prison pursuant to a state judgment that rests on adequate and independent state grounds. They are easier to fit into the exhaustion statute, although admittedly a bit of shoehorning is still required.

Congress has provided that state remedies need not be exhausted when "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U. S. C.

§ 2254(b)(1)(A)(ii). The language was probably inspired by extreme cases such as *Moore* v. *Dempsey*, see *supra*, at 14-15, but it is expansive enough to accommodate less severe problems. An effective system of review has reasonably clear rules that tell an appellant what to file, where, and when. The burdens it imposes are not unreasonable. It does not set "springes" which trap claims without warning or for no valid purpose. See *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923); *Lee* v. *Kemna*, 534 U. S. 362, 376-378 (2002). It should have enough flexibility to grant relief despite default where the petitioner has good cause and is prejudiced, and it should certainly hear the claim of a prisoner who can prove he is actually innocent. If the state rules do not permit a hearing on the merits in these circumstances, then the process is ineffective and exhaustion is excused.

E. Summary and Application.

In summary, an exhaustion-based rule of procedural default would work this way:

1. A criminal defendant has failed to exhaust his state remedies if he does not fairly present his claims to each level of the state courts where review is available.

2. The federal claim must be "plainly and reasonably made," *Lee* v. *Kemna*, 534 U. S., at 376 (quoting *Davis* v. *Wechsler*, 263 U. S., at 24), meaning facts, argument, and authorities. The authorities must identify the claim as federal to preserve a federal claim. See *Duncan* v. *Henry*, 513 U. S. 364, 366 (1995).

3. The claim must be presented in accordance with the state's rules of procedure.

4. The only cases where a claim will be deemed exhausted despite a default are those where it clearly appears that the state court decided to excuse the default and decided solely on the merits. See *supra*, at 26.

5. Under 28 U. S. C. § 2254(b)(1)(B)(i), exhaustion is excused if the state simply has no corrective process. This should rarely, if ever, happen any more.

6. The ineffective process exception of 28 U. S. C. § 2254(b)(1)(B)(ii) applies to the following situations:

a) The state courts' enforcement of their default rule despite cause and prejudice or a compelling showing of actual innocence;

b) Rules so nebulous, or changed after the fact, that counsel cannot determine the proper procedure to preserve the claim (Justice Holmes' "springes"); or

c) Application of a rule in circumstances where it serves no legitimate state interest, which *Lee* assures us will be rare. 534 U. S., at 379-380.

In all other cases, defaulted claims will not be grounds for habeas relief. In particular, states will not be punished for allowing their courts to exercise discretion to relieve default in particularly compelling cases, nor will they be required to define with mechanical, mathematical predictability precisely what they deem to be sufficiently compelling.

Application to the present case is simple. Reese's presentation of his federal Sixth Amendment ineffective assistance of appellate counsel claim to the Oregon Court of Appeals and Supreme Court was neither "plainly and reasonably made," in the sense of *Davis* and *Lee*, nor in compliance with Oregon rules. Those courts' summary denials of relief did not waive the default. None of the circumstances excusing nonexhaustion apply. The claim must be denied.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation